# (30,324)

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1924

# No. 381

JOHN W. STEPHENSON, EMMA THOMSON, JENNIE STEPHENSON, ET AL., APPELLANTS,

*vs.*

H. L. KIRTLEY, H. W. HAROLD, AND F. E. CAWLEY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

INDEX



JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 18, 1924

[fol. 1] CAPTION—Omitted

[fol. 2] **IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

In Chancery

JOHN W. STEPHENSON, EMMA THOMSON, JENNIE STEPHENSON, MARY S. WEIMER, and W. B. STEPHENSON, Plaintiffs,

vs.

H. L. KIRTLEY, H. W. HEROLD, and F. E. CAWLEY, Defendants

PLAINTIFFS' BILL OF COMPLAINT—Filed July 2, 1923

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To the Honorable George W. McClintic, judge of the District Court of the United States for the Southern District of West Virginia:

The plaintiffs above named file this their bill of complaint, and for their cause of action respectfully show unto your honor:

First

That the plaintiffs John W. Stephenson and Mary S. Weimer are residents and citizens of the State of Minnesota; that the plaintiffs Emma Thomson and W. B. Stephenson are residents and citizens of the State of Pennsylvania, and that the plaintiff Jennie Stephenson is a resident and citizen of the State of California; and that the defendants H. L. Kirtley and H. W. Herold are residents and citizens of the State of West Virginia and of the Southern District thereof, and the defendant F. E. Cawley is a resident and citizen of the State of Massachusetts.

Second

That this suit is between citizens of different states; that the amount in controversy herein exceeds the sum of three thousand dollars, exclusive of interest and costs.

Third

(1) That the plaintiffs John W. Stephenson, Emma Thomson, Jennie Stephenson and Mary S. Weimer are the owners of a one-fourth undivided interest in certain lands situate in Nicholas County, West Virginia, and within the Southern District of the State of West [fol. 3] Virginia, the said parties being the owners of said one-fourth interest in the following proportions: said John W. Stephenson, 3/48; said Emma Thomson 5/48; said Jennie Stephenson 1/24 and said Mary S. Weimer 1/24.

twelfths of said one-fourth, leaving in himself the other one-sixth of said one-fourth, an office copy of which deed is filed herewith as part hereof marked "Exhibit No. 7." That subsequently the plaintiff Emma Thomson purchased the interest of said W. B. Stephenson in said land, to-wit, a one-sixth of a one-fourth thereof, and paid him in cash the sum of three thousand dollars therefor, and the said W. B. Stephenson by deed of January 12, 1911, conveyed to the said Emma Thomson his one-sixth interest in the one-fourth owned by the said Stephensons, an office copy of which deed is filed herewith as part hereof marked "Exhibit No. 8," so that after the making of said deed the said one-fourth interest in said lands was owned by the plaintiffs John W. Stephenson, Emma Thomson, Mary S. Weimer and Jennie Stephenson in the proportions of three-forty-eighths by said John W. Stephenson, five-forty-eighths by said Emma Thomson, and a one-twenty-fourth each by said Jennie Stephenson and Mary S. Weimer, and that the same has been and still is held by the same parties in the same proportions.

(3) That the defendant F. E. Cawley, on the 27th day of February, 1920, instituted a suit in the Circuit Court of Nicholas County, West Virginia, against the plaintiffs herein, returnable to March Rules, 1920, having for its purpose the collection from W. B. Stephenson, the defendant in that suit, of a large sum of money, to-wit, the sum of twenty thousand dollars, with interest for several years, and subjecting to sale in satisfaction of said claim the interest of said W. B. Stephenson in said Nicholas County lands and claiming [fol. 7] and averring that the said W. B. Stephenson was the owner of a full one-fourth interest in all of said lands and that the deeds made by him to his co-plaintiffs in this suit were fraudulent and void and made for the purpose of preventing the said F. E. Cawley from collecting the said claim. That all of the defendants in that suit, the plaintiffs in this suit, were proceeded against as non-residents; that no process was ever served upon them in said suit; that a purported attachment was issued in said case and the same levied upon the one-fourth undivided interest in said lands as the property of said W. B. Stephenson. That in said suit a decree was entered purporting to adjudge that the said deeds made by said W. B. Stephenson to his co-plaintiffs herein were fraudulent and void, and attempting to set the same aside in so far as the plaintiff in that suit, the defendant in this suit, F. E. Cawley, was concerned, and directing that the said one-fourth interest be sold in satisfaction of the claim of said F. E. Cawley, which said decree was entered on the 25th day of February, 1921. That pursuant to the directions contained in that decree W. G. Brown, J. M. Wolverton and T. W. Ayres, who were thereby appointed special commissioners for the purpose, made a purported sale of the said one-fourth interest in said lands, at which sale defendants H. L. Kirtley and H. W. Herold became the purchasers. That the said special commissioners reported said sale to said Circuit Court of Nicholas County and the same was attempted to be confirmed by said court on the 20th day of May, 1921, and the said special commissioners were directed

to convey said one-fourth interest to said purchasers upon the payment of the purchase money, and that on the 18th day of May, 1923, the said special commissioners did attempt to convey the said one-fourth interest in said lands to said purchasers, reciting therein that all of the purchase money had been paid. An office copy of the record of the proceedings had in said Circuit Court of Nicholas County is herewith filed as part hereof marked "Record" and a duly [fol. 8] certified copy of the purported deed from said special commissioners Brown, Wolverton and Ayres to said Kirtley and Herold is likewise filed herewith as part hereof marked "Exhibit No. 10."

(4) That the orders and decrees entered by the Circuit Court of Nicholas County in said cause, and the deed made by said special commissioners to said Kirtley and Herold pursuant thereto are void and of no effect, for the reasons that the said court did not have jurisdiction to enter said decrees at the time the same were entered, nor at any other time; that the only basis of the jurisdiction of said court was the order of attachment attempted to be levied upon said one-fourth undivided interest in said real estate. That the said order of attachment was void and of no effect for the reason that there was no valid affidavit as required by law on which the same was issued; that under the law of the State of West Virginia in order to a valid attachment the affidavit must set out the nature of the plaintiff's claim with the same certainty and directness that is required in a declaration or other pleading; that the affidavit filed in this case simply states that the plaintiff's claim is one arising out of contract, as will be seen from a reference to said affidavit. There is a statement in the affidavit that the plaintiff in that suit recovered certain judgments against W. B. Stephenson, but there is no allegation or statement in the affidavit that these judgments so recovered constitute the claim upon which the plaintiff in that case brings the suit. That the invalidity of said attachment affidavit appears upon the face thereof, and that under the law of the State of West Virginia an attachment based upon an invalid affidavit is absolutely null and void, and must be quashed, and when the jurisdiction of the court depends upon such attachment, the suit must be dismissed, the only basis of jurisdiction being removed.

(5) That said proceedings are absolutely null and void for the further reason that under the law of the State of West Virginia before a valid decree can be entered adjudging the rights of the parties [fol. 9] in a suit in which no personal service has been had there must be allegation and proof of the facts upon which said decree rests; that in this case there was no proof offered and none could be offered to sustain the allegation that the deeds made by W. B. Stephenson to his co-plaintiffs were fraudulent; that as will appear from the said decree filed herewith as part of the Exhibit marked "Record", no evidence whatever was heard and the plaintiffs say that the court was without jurisdiction to enter a decree ordering the sale of said lands and setting aside the deeds to them in the absence of evidence to support the allegations of the bill. That this lack of jurisdiction appears from the face of the purported decree it-

self, it affirmatively showing what the court considered, and it not appearing from this recital that any evidence was taken and heard, and in fact the whole record discloses that no evidence was heard, and plaintiffs are advised and aver the truth to be that no evidence of any kind was heard by the court before entering said decree.

(6) That as a matter of fact the allegations of said bill are entirely false; that the said W. E. Stephenson never did own more than a one-twenty-fourth undivided interest in said lands; that at the time they were purchased, one-sixth of the purchase money was furnished by each of the Stephenson children and the purchase made in the interests of all of them; that the one-sixth interest so originally owned by the said W. B. Stephenson was sold by him for a valid and ample consideration to the plaintiff Emma Thomson without any purpose on her part or any knowledge of any purpose upon the part of said W. B. Stephenson to defraud anybody; and plaintiffs aver that so far as the transactions involved in connection with these lands are concerned there never was any fraud on the part of said W. B. Stephenson towards the said F. E. Cawley or anybody else.

(7) That these plaintiffs had no knowledge of said suit or the proceedings had therein until more than two years after the entry [fol. 10] of the final decree of sale and confirmation of sale, and that under the law of West Virginia they can not be permitted to appear in said suit and defend the same after the expiration of two years from the entry of such final decree. That the said plaintiff F. E. Cawley, although well knowing the residence of all of the plaintiffs in this suit, and well knowing their interest in the subject matter thereof, never advised them of the pendency of said suit to subject said one-fourth interest in said lands to sale; but on the other hand carefully concealed from them all knowledge of the pendency of said suit.

(8) That the said plaintiffs and their co-tenant the said A. L. Hegarty are in the possession of said lands.

(9) That the said defendants Kirtley and Herold are claiming said lands under the purported deed made to them by said special commissioners Brown, Wolverton and Ayres above referred to, and that the said deed and the decrees entered by the Circuit Court of Nicholas County directing sale of said one-fourth undivided interest in said lands and attempting to confirm the sale thereof by said special commissioners are all null and void for the reasons aforesaid, and constitute clouds upon the title of the plaintiffs J. W. Stephenson, Emma Thomson, Mary S. Weimer and Jennie Stephenson to said one-fourth undivided interest in said lands.

Prayer

Plaintiffs pray that the decree of the Circuit Court of Nicholas County above referred to, entered February 25th, 1921, directing the sale of said lands, the decree entered May 20th, 1921 confirming said supposed sale thereof, and the deed made by said special commis-

sioners Brown, Wolverton and Ayres on the 18th day of May, 1923, attempting to convey said lands to the defendants Kirtley and Herold, all of which are herein set forth and referred to, may be decreed to be null and void and of no force and effect, and that the [fol. 11] cloud arising therefrom upon the title of the plaintiffs John W. Stephenson, Emma Thomson, Jennie Stephenson and Mary S. Weimer to said lands may be removed and a decree entered adjudging said plaintiffs to be the owners of a one-fourth undivided interest in said lands in fee simple.

John W. Stephenson, Emma Thomson, Jennie Stephenson, Mary S. Weimer, W. B. Stephenson, by Counsel. Miller & Hartswick, A. J. Horan, Brown, Jackson & Knight, Counsel for Plaintiffs.

Jurat showing the foregoing was duly sworn to by Emma Thomson omitted in printing.

[File endorsement omitted.]

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[fol. 12] EXHIBIT NO. 1 TO BILL OF COMPLAINT

This Deed, made the 5th day of March, 1902, between Mary E. Rhodes of the city of Marietta, Washington County, Ohio, by Frank R. Ellis of the city of Cincinnati, and State aforesaid, her attorney in fact, of the first part, and A. L. Hegarty and W. B. Stephenson of the County of Clearfield, and State of Pennsylvania, of the second part, Witnesseth, that the party of the first part, in consideration of Twelve ($12.00) Dollars per acre, doth hereby grant, with covenants of General Warranty, to the said A. L. Hegarty three-fourths undivided and to the said W. B. Stephenson one fourth undivided of all her three, certain contiguous tracts of land, lying and being in Hamilton and Summersville Districts in the county of Nicholas and State of West Virginia on headwaters of Buffalo Creek, a branch of Elk River, and Twenty-mile, Peters Creek, and some of the west branches of Muddlety Creek, tributaries of Gauley River:

The First tract is bounded and described as follows, to-wit: Beginning at two chestnuts on the wagon road leading from Muddlety Creek to Clay Court House on a ridge corner to the 1,200 acre tract (No. 2) and to the Ogden and Looney tract and to a tract owned by James Robinson and with the latter S. 14 W at 18 poles crossing a drain flowing west, 55 poles to a double chestnut and chestnut oak as top of ridge corner to Robinson, thence N. 82 E. crossing point of ridge at 18 poles, 58 poles to a double chestnut on southwest brow of the mountain corner to Robinson, thence S. 34½ E., at 56 poles crossing a drain flowing southwest, at 90 poles to a path at top of ridge, at 123 poles crossing a drain flowing southwest, at 158 poles crossing top of a flat ridge, in all 225 poles to three white oak stumps true corner in Elihah Bobbitt's field at a rock pile and stake, thence S. 83½ W. 34.6 poles to a beech and white oak on a hill side, thence

S. 44 degrees and 50 minutes W. 78 poles to a poplar and gum in laurel at the foot of hill crossing the south fork of Meadow Creek at [fol. 13] 35 poles, thence S. 59 E. 58 poles and 8 links to a spruce pine, beech and birch on left bank of left fork of Meadow Creek crossing a branch of Meadow Creek flowing north at 7.4 poles, thence N. 47 E. 34.6 poles to a white oak on a hillside crossing said left fork at 3 poles, thence S. 7 E. 62.6 poles to two white oaks near a branch on a west hillside thence S. 66 degrees and 6 minutes W. 62 poles to a gum and hickory near top of ridge at foot of knob crossing a branch of Meadow Creek at 22, poles, thence along the ridge S. 41½ W. 79 poles to a double chestnut on point of a small ridge, thence S. 68 W. 133 poles to a chestnut oak in a low gap in the divide between the waters of Muddlety and Peter's Creek at the head of Buck's Garden Creek, thence S. 55 W. 41 poles to two linds (one down) on top of the divide, thence S. 22 degrees and 40 minutes W. 31 poles to a locust at the top of the divide, thence S. 33 W. 96 poles crossing head of a hollow to a double chestnut marked as a pointer in a flat at top of the divide where two chestnut oaks stood, original corner to school land, and with the latter S. 63 degrees and 10 minutes W. 58.4 poles to a sugar original corner on top of divide between Buck's Garden Creek and Pine run branches of Peter's Creek at west end of a gap, thence N. 86 W. 20 poles to two chestnuts marked as pointers on north side of a high knob where a poplar original corner stood (poplar found down), thence S. 79 W. 8 poles and 6 links to a yellow lind original corner, thence S. 40 W. 114 poles to two chestnut oaks on the brow of a high point on said dividing ridge, thence N. 80 W. 34 poles to a red oak on top of ridge, thence S. 28 degrees and 10 minutes W. 35 poles to a red oak on left side of top of a flat on said ridge, thence S. 73 W. 104 poles to a chestnut oak at top of ridge at foot of a knob, thence N. 80 W. 32 poles to a red oak and chestnut oak near top of ridge in low gap corner to said school land and a tract of 9,100 acres granted to William Wilson, and *with* running with the lines of Allen Rader's farm N. 33 degrees and 8 minutes, W. 279 [fol. 14] poles to three hickories and a chestnut oak where maple stood on a hillside corner to said Wilson tract, now Allen Rader, crossing the right hand fork of Buck's Garden Creek at 207 poles, thence N. 54 W. 230 poles to a double chestnut oak at top of ridge between Buck's Garden and Twenty Mile Creek at foot of a knob corner to said Wilson grant of 9,100 acres and to the Cameron-Brockeroff lands passing top of ridge at 32 poles, at 50 poles to head of hollow flowing to the right, at 126 poles to top of ridge running southeast and northwest, thence with Brockeroff N. 40½ E., crossing a branch of Twenty Mile Creek at 170 poles, at 222 poles another branch of said creek, at 364 poles crossing a drain of Twenty Mile Creek, at 488 poles crossing another branch of Twenty Mile, and on 609 poles of three chestnut oaks at top of ridge between Twenty Mile and Buffalo Creek, thence N. 64 W. 40 poles along said ridge to three chestnuts (down), thence S. 83 W. 38 poles to a chestnut oak on top of knob, thence N. 11 E. 48 poles crossing head of Beechy Fork of Buffalo, and on 54 poles to two hickories (one down) on a hillside, thence N. 38 E. 58 poles to a double beech, on bank of a branch

of Beechy Fork, thence S. 63 E. 17 poles to two chestnut oaks and a poplar (all down), thence N. 83½ E. at 47 poles crossing Clay County road, at 98 poles crossing a branch of Robinson's Fork of Buffalo, in all 127 poles to a gum on a hillside, thence N. 20 E. 41 poles to a chestnut oak on top of mountain in laurel, thence N. 24 W. 31 poles to a small gum and two chestnut oaks (down) thence N. 42 E. 68 poles to a stake with gum pointers, thence S. 23 E. 31 poles to two chestnut oaks on cliff at brow of mountain, thence S. 39 degrees and 54 minutes, E. at 12 poles crossing line of Wilson Survey of 93,000 acres (Cameron-Brockeroff line) corner to Ogden and Looney tract, and with, 60 poles crossing hollow draining north east, at 102 poles to a deep hollow and up same in all 224 poles to two chestnut oaks on the north east side of road at top of ridge at head of said hollow, thence S. 64 degrees and 24 minutes E. 106 poles crossing road to a chestnut oak at top of ridge by side of road, and [fol. 15] thence S. 53 W. 40 poles to two chestnuts to the beginning, containing exclusive of three reservations 3,096.9 acres. The three reservations embraced within the lines of said tract which are excepted and reserved from the operation of this conveyance are 110.5 acres of Sinnett Rader's 171.7 acres for John Rader, and 112.1 acres of J. S. Hill.

The Second Tract is bounded as follows, to-wit: Beginning at two chestnuts on ridge by the side of the Clay County Road corner to tract No. 1 (3,000 acre grant), to a tract of Ogden and Looney, and to a tract of James Robinson and with the latter N. 73 degrees and 38 minutes E., at 8½ poles crossing Clay County Road, at 40 poles crossing a hollow draining to left, at 78 poles crossing top of narrow ridge, at 88 poles to head of hollow draining to left, at 96 poles to top of ridge running north east and south west, at 140 poles to head of deep hollow draining to left, at 210 poles to top of dividing ridge between waters of Meadow Creek and Buffalo creek, at 252 poles to head of deep hollow draining east, and on 314 poles to a beech where a beech and double maple are called for (maple found down) at top of ridge on the side of a knob corner to C. F. Herold, and running thence with his lines down ridge N 6 degrees and 35 minutes W. 80 poles to a maple and birch pointers where a poplar and red oak original corner stood, thence N. 56 degrees and 48 minutes E. at 13 poles crossing Broken-bridge Run of Muddlety Creek, at 21 poles crossing the road, 28.6 poles to a white oak and hickory above road on hill side, thence S. 78½ E. 40 poles to end of a point ridge, 67 poles to hollow draining to right, at 140 poles passing a high point 190 p. to a hollow draining to right, in all 220 poles to a chestnut-oak (down) original corner thence running with lines of Anderson Herold, N. 15½ W. 91 poles to top of ridge, 156 poles to a gum, whit- oak and two chestnuts, near top of ridge at head of hollow draining west where a gum, maple, and beech are called for (the gum is an original corner), thence N. 32 degrees and 10 minutes east 96 poles to two beech stumps in Anderson Herold's field below point of high knob where original corner two [fol. 16] beeches and a maple stood, thence S. 89 W. 54 poles to

two sugars on east hillside, thence N. 28 W. 46 poles to end of point ridge, at 179 poles crossing a branch of Enoch Run of Muddlety Creek, 184 poles to a double chestnut and two white oaks and a poplar where a double chestnut and two maples stood (maples down), thence N. 46 E. 60 poles passing point of a ridge, 74 poles to two spruce pines and a maple (maple dead) on right hand fork of Enoch Run corner to Anderson Herold and Remley's 510 acre tract, and with the latter N. 43 W. 132 poles to a point where stake is called for in Lot 1 of Blair Survey to a lind and dogwood corner to Remley and tract No. 3 (500 acre grant), and with the latter and Ogden and Looney S. 28 degrees and 20 minutes W. 773 poles to the beginning, containing 957.2 acres being the remainder of Lot No. 1 of Blair Survey.

The Third Tract is bounded as follows, to-wit: Beginning at a stake, lind and dogwood, pointers, corner to tract No. 2 (Blair Lot No. 1) and corner to Remley's 510 acre tract, and with the latter N. 19½ E. 23 poles crossing a branch draining southeast, 128 poles to head of hollow draining north east, 166 poles to top of ridge, 192 poles to head of Enoch Run, on 216 poles to a bunch of chestnuts corner to Remley and certain school lands, and with the latter N. 66 W. 70 poles to a hickory, gum chestnut, and two dogwoods, at head of Buffalo Creek corner to Cameron and Brockeroff tract, and with the latter S. 45½ W. 35 poles to top of ridge running northwest and south east, 75 poles to top of ridge running north west and south-east, 92 poles to a hollow draining north west, 124 poles to top of a narrow ridge running north west and southeast, 180 poles crossing a branch of Robinson's Fork of Buffalo Creek, 224 poles to top of a ridge, 258 poles to head of a deep hollow draining northwest, 272 poles to end of a point ridge, and up same *same* course 327 poles to two chestnuts marked where original corner two poplars stood on west hillside facing branch of Robinson's Fork, thence N. 87½ W. 82 poles to a gum and two black oaks (latter down) at top of ridge near a path, thence N. 18 E. 65 poles along top of ridge to two chestnut oaks near a path, thence, N. 23 W. 33 poles along [fol. 17] top of ridge to a chestnut and chestnut oak, thence S. 67 W. 23½ poles to a gum and chestnut oak on west hill side at head of hollow, (latter down), thence N. 78 W. 30 poles to a poplar and two chestnuts on a west hillside by a branch of Buffalo Creek thence S. 42 W. 77 poles crossing several branches flowing northwest to a small chestnut oak sapling near top of a ridge where chestnut oak and chestnut original corner stood (both found down), thence S. 1 degree and 40 minutes W. 44.6 poles to a chestnut and two-chestnut-oaks near top of ridge at the side of a road, thence S. 28 E. 120 poles to two gums and a chestnut at the top of a ridge near the line of the Cameron-Brokeroff land, thence S. 21 E. 15 poles crossing Cameron et al. line, and running with the Ogden and Looney as claimed by latter 332 poles in all to a stake on line of tract No. 2 and with same N. 28 degrees and 20 minutes E. 480 poles to the beginning, containing 789.97 acres. But the metes and bounds of the last described tract as here given leave out 124.3 acres of the land conveyed to the late Charles R. Rhodes and bequeathed by him to the

grantor Mary E. Rhodes because of a supposed interlock to that extent with the Ogden and Looney tract adjoining, but the said Mary E. Rhodes does not for that reason abandon or relinquish any right or title which she now has to said land or her right to convey the same to the grantees or any other party to whom she may hereafter sell.

The aggregate acreage of the land hereby conveyed being by survey of W. C. Reddy 4844.07 acres the aggregate purchase money is found to be Fifty-eight Thousand One Hundred and Twenty-eight Dollars and Eighty-four Cents ($58,128.84) of which sum Twenty Thousand Dollars ($20,000.00) has been paid cash in hand the receipt whereof is hereby acknowledged.

[fol. 18] The balance of said purchase money is represented by six notes herein described and to be paid as follows: One note for Three Thousand Nine hundred and Ninety Dollars and Twenty nine Cents ($3,990.29) payable one year after date: two notes for Four Thousand Three Hundred and Fifty nine Dollars and Sixty-six Cents ($4,359.66) each, payable one year after date; one note for Five Thousand Eight Hundred and Twelve Dollars and Eighty-eight Cents ($5,812.88) due two years after date; one note for Six Thousand Eight Hundred and Ninety Six Dollars and Seventy-three Cents ($6,896.73) due two years after date; and one note for Twelve Thousand Seven Hundred and Nine Dollars and Sixty two cents ($12,709.62) due three years after date.

All of said notes are signed by the said A. L. Hegarty and W. B. Stpehenson the grantees herein, are dated March 5th, 1902, bear legal interest at 6% from date until payment, and a lien is hereby expressly reserved on the lands hereby conveyed to secure the payment of the said unpaid purchase money represented by and described in said notes. Said notes are executed and made payable to Frank R. Ellis Attorney in fact for Mary E. Rhodes, and may be paid at any time before maturity with interest to date of payment.

And it is expressly und--stood by the grantor in this deed as well as the grantees accepting it that if there should be any shortage in the aggregate acreage of the land hereby conveyed that the grantees shall have an abatement of the purchase money at the rate of Twelve ($12.00) Dollars per acre for all of said shortage as of the date of this deed, and if a correct survey of the said lands should show a greater aggregate acreage, than that mentioned herein then the grantor shall be entitle- to receive the same price per acre for all such excess with interest from March 5, 1902, until paid.

[fol. 19] And the parties of the second part by accepting this deed agree not to cut or remove any timber from the land hereby conveyed without the written consent of the grantor herein first being had and obtained unless the said purchase money shall have been fully paid.

To Have and To Hold the above described land and premises with the appurtenances of every kind and character whatever unto him the said A. L. Hegarty three-fourths in interest undivided & unto him the said W. B. Stephenson ¼ Interest undivided to the only proper use and behoof of them their heirs and assigns forever.

And the party of the first part hereby covenants to warrant generally the title to the lands hereby conveyed and that she will pay all unpaid taxes which may be due on said land up to and including the year 1901, the party of the second part to pay all taxes assessed for the year 1902 and thereafter. And the said grantor further covenants that she has the right to convey the said land to the grantees; that the grantees, their heirs and assigns, shall have quiet possession of the said lands free from all incumbrances after the payment of said unpaid purchase money; that the said party of the first part will execute such other and further assurances of the said lands as may be requisite to make the title good, and that she has done no act to incumber the said lands.

Witness the following signature and seal.

Mary E. Rhodes, by Frank R. Ellis, Her Attorney-in-fact. (Seal.)

STATE OF OHIO,
Hamilton County, To wit:

I, Ernest Rehm a Notary Public in and for said County and State do certify that Frank R. Ellis, attorney in fact for Mary E. Rhodes of Marietta, Washington County, Ohio, whose names is signed as such to the foregoing deed, bearing date on the 5th day of March, 1902, has this day acknowledged the same before me in my said county.

Given under my hand and official seal this 5th day of April 1902.

[fol. 20] Ernest Rehm, Notary Public, Hamilton County, Ohio. (Notarial Seal.)

WEST VIRGINIA,
Nicholas County:

Court Clerk's Office

June 11th, 1904.

This Deed from Mary E. Rhodes by Frank R. Ellis her attorney in fact to A. L. Hegarty and W. B. Stephenson was this day presented in this office and with the certificate of acknowledgment thereon admitted to record.

Teste:

Joseph A. Alderson, Clerk of said Court.

A true copy. Teste: P. N. Warner, Clerk.

(Endorsed:) District Court U. S., So. Dist. W. Va. Filed this 2nd day of July, 1923. Ira H. Mottesheard, Clerk.

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[fol. 21] EXHIBIT No. 2 TO BILL OF COMPLAINT

This deed made this the 18th day of January 1906, between James S. Craig, Michael C. Duffy, James B. Duffy, Terance J. Duffy, Francis F. Duffy, and Owen A. Duffy, all unmarried, parties of the

first part, and A. L. Hegarty and W. B. Staphenson, parties of the second part.

Whereas during the life time of P. F. Duffy, he and James S. Craig owned jointly, the lands hereinafter mentioned and they sold same to the grantees herein named, at the price named in this deed and the purchase money was paid to them in full; and the said P. F. Duffy having departed this life intestate, without executing a deed, and he, the said P. F. Duffy left to survive him his said five brothers and *ony heris* at law, towit: Michale C. Duffy, James B. Duffy, Terance J. Duffy, Francis F. Duffy and Owen Duffy.

Now, therefore, this deed witnesseth: That for and in consideration of the sum of Four Thousand Seven Hundred and Eighty two Dollars ($4,782.00) heretofore in hand paid, to said James S. Craig and P. F. Duffy, the parties of the first part do grant unto the parties of the second part, in the proportions hereinafter set out, that certain tract of land situated on the waters of Peters Creek in Summersville District, Nicholas County, West Virginia, adjoining the Benewine Peyatte, the McGee lands, the J. Haymond Robinson 950 acre survey, the tract of 135 acres patented to John H. Robinson, the Rhodes 3,000 acres and the B. L. Rader lands, and is bounded as follows, to-wit: Beginning at a stake at the edge of cleared land and by fence, and about 6 poles from where a poplar corner is called for, the stake in line of Robert G. Carden, thence with Carden's line up a ridge N. 69 E. 8 poles to a chestnut on hill side, N. 22 E. 50 poles to a stake and pointers on a ridge where two hickories are called for not found N. 64 E 80 poles to a stake by a large rock on hill side near the tip here hickory is called for, not found N. 45 E. 20 poles to Carden's line and Abe Keffer's corner, a stake, leaving Carden's land and with Keffer, same course in all 67 poles to a chestnut oak on a [fol. 22] ridge, N. 25 45′ E. 41/3/5 poles to two chestnut oaks and maple on a ridge, N. 5 30′ W. 74 poles to a small yellow lynn, on ridge, N. 21 30 E. 44 poles to stake and pointers in line of Rhode's tract, now Hagerty and Stephenson, and with same leaving Keffer's N. 31 45′ E. 8 poles to a red oak, down, in the divide between Pine Run and Bucks Garden, and along top of divide, S. 79 30′ E. 33-7/10 poles to two chestnut oaks on high point, one down, N. 42 30′ E. 106-8/10 poles to a stake where a yellow lynn is called for, not found N. 79 30′ E. 8 poles to a poplar not found, on side of high point, S. 85 30′ E. 20 poles to sugar tree on sharp ridge, N. 64 E. 58 poles to a stake with chestnut pointers, on a high point, corner to the 135 acre tract purchased by Hagerty and Stephenson from J. Haymond Robinson, leaving the Rhodes land and with the 135 acre tract S. 20 E. 32 poles, to a chestnut oak, down, on a branch of Pine Run near the head, S. 16 30′ W. 68 poles to a chestnut oak and gum on a point, S. 47 E. 19 poles to a gum and two chestnuts on the side of a ridge, near the top, N. 73 30′ E. 63 poles to two chestnut oaks on the — of steep ground and near the top of the ridge, N. 52 30′ E. 24 poles to a chestnut and chestnut oak, chestnut gone on side of a ridge near the top and corner to Robinson's 950 acre survey, leaving the 135 acre tract and with the 950 acre tract, N. 73 30′ E. 144 poles to a double chestnut oak and small chestnut on top of the divide

between Pine Run and Muddlety Waters, the chestnut oak is down, leaving the 950 acre tract and with Herold S. 5 E. 18 poles to a black oak new corner, where a black oak is called for, not found, on steep ground near the top of divide, and with Herold S. 19-3/4 W. 46 poles to a black oak and hickory on hill side near low gap between pine run and Fockler's Branch S. 22 45′ E. 51 poles to 4 chestnut saplings on a hill side below and near a rock camp S. 30 W. 29 poles to a locust and chestnut sapling on a ridge, corner to Perkin's place, leaving Herold and with Perkin's place now R. M. Bryant, and S. 44 45′ E. 49-1/2 poles to a poplar and chestnut on top of the divide between [fol. 23] Pine Run and Peter's Creek, S. 60 W. 58-4/10 poles to 4 chestnut oaks, on top of the divide, S. 61 45′ W. 24 poles to two hickories, and two chestnut oaks leaving the mountain and Bryand and with Horan down the mountain, N. 44 30′ W. 45 poles to a poplar on flat, new corner, N. 77 30′ E. 25 poles cross a hollow to a small yellow lynn on a steep bank, N. 42 W. 89-8/10 poles to a poplar and beech, beech down, on a hill side, S. 62 W. 29 poles to a stake and pointers at County Road, N. 44 30′ W. 34-6/10 poles to two chestnut oaks on a high ridge standing 30 feet apart, S. 45 15′ W. 157-6/10 poles to pointers on a ridge, in B. L. Rader's field and corner to Rader, and with N. 11 W. 161 poles, to a birch and pointers, on a hill side, old call, beech, birch and maple, S. 63 W. 91-6/10 poles, crossing Pine Run at 13 poles, to a white oak and dogwood in cove, S. 8 W. 155 poles to chestnut oak, S. 70 W. 210 poles to the beginning containing three hundred and ninety-eight and one-half acres (398-1/2), and being the same real estate conveyed by James S. Craig former Commissioner of school lands for Nicholas County West Virginia and Francis B. Smith, Commissioner of School Lands for said County to Andrew J. Horan, by deed dated November 3, 1897, conveyed as two tracts adjoining each other, one of 166 acres and the other of 191 acres, which deed is recorded in the office of the Clerk of the County Court of said County in Deed Book No. 31, on page 220, and being the same tract of land conveyed by A. J. Horan and wife to said James S. Craig and Theodore B. Horan by deed dated November 18, 1897, and recorded in said office in said Deed Book No. 31 on page 228, and the said T. B. Horan and wife by deed dated February 14, 1898, conveyed the undivided one-half of said real estate to the said P. F. Duffy, which deed is also recorded in said office in said Deed Book No. 31, on page 235, and being the same lands conveyed by Robert A. Kincaid, Commissioner of School Lands of said County to James S. Craig and P. F. Duffy by deed dated November 8th, 1901, and recorded in said office.

[fol. 24] The parties of the first part do grant unto the said A. L. Hegarty three-fourth thereof and to the said W. B. Stephenson one-fourth thereof.

Said land is sold and conveyed by the acre at Twelve dollars per acre.

The said James S. Craig warrants generally one-half undivided of said tract of land and the other grantors, as heirs at law of P. F. Duffy, deceased warrant generally the other one-half undivided thereof.

Witness the following signatures and seals:
James S. Craig. (Seal.) James B. Duffey. (Seal.)
Michael C. Duffy. (Seal.) Terence J. Duffy. (Seal.)
Francis F. Duffy. (Seal.) Owen A. Duffy. (Seal.)

In presence of Rose Namile, William J. Ryan, as to F. F. D. & O. A. D.

STATE OF WEST VIRGINIA,
Nicholas County, To wit:

I, T. B. Horan, a Notary Public in and for said County and State, do certify, that James S. Craig and Michael C. Duffy, whose names are signed to the writing above bearing date on the 18th day of January, 1906, have this day acknowledged the same before me in my said County.

Given under my hand this the 7th day of Feb. 1906.
T. B. Horan, Notary Public.

[fol. 25] STATE OF WEST VIRGINIA,
County of Nicholas, To wit:

I, T. B. Horan, a Notary Public in and for said County and State do certify, that James B. Duffy whose name is signed to the writing hereto annexed bearing date on the 18th day of January, 1906, has this day acknowledged the same before me in my said County.

Given under my hand this the 19th day of Feb. 1906.
T. B. Horan, Notary Public.

STATE OF WEST VIRGINIA,
Brooke County, To wit:

I. C. K. Jacob, a Notary Public in and for said County and State do certify that Terence J. Duffy whose name is signed to the writing hereto annexed bearing date on the 18th day of January 1906, has this day acknowledged the same before me in my said County.

Given under my hand this the 2nd day of April 1906.
C. K. Jacob, Notary Public. (Notarial Seal.)

STATE OF WISCONSIN,
Fond du Lac County, To wit:

I. Wm. J. Ryan, a Notary Public in and for said county and state, do certify that Francis F. Duffy and Owen A. Duffy whose names are signed to the writing hereto annexed bearing date on the 18th day of January 1906, have this day acknowledged the same before me in my said county.

Given under my hand and official seal on this the 9th day of April, 1906.
William J. Ryan, Notary Public. My commission expires Sept. 29th, 1907. (Notarial Seal.)

[fol. 26] West Virginia,
Nicholas County:

Court Clerk's Office

May 1, 1906.

This deed with the certificates thereon was this day admitted to record in said office.

Teste: Jos. A. Alderson, Clerk said Court.

(Endorsed:) District Court U. S., So. Dist. W. Va. Filed this 2nd day of July, 1923. Ira H. Mottesheard, Clerk.

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[fol. 27] Exhibit No. 3 to Bill of Complaint

This deed made this the 17th day of July 1903, between J. Haymond Robinson and Jane Robinson, his wife, of the County of Nicholas, State of West Virginia parties of the first part and A. L. Hegarty of Clearfield County, State of Pennsylvania, of the second part. Witnesseth: That for and in consideration of the sum of Sixteen Hundred and twenty dollars ($1,620.00) in hand paid, the receipt of which is hereby acknowledged, the parties of the first part Do Grant unto the said A. L. Hegarty, with covenants of general warranty that certain tract of land lying on the head waters of Peter's Creek and the head waters of Meadow Creek, a branch of Muddlety Creek, adjoining 3,000 acres patented to John H. Robinson, and 950 acres granted to J. Haymond Robinson by the State of West Virginia and the lands of other in Summersville District, Nicholas County, West Virginia, and is bounded as follows, to wit: Beginning at a chestnut oak near a low gap at the head of the left hand fork of Buck's Garden Creek, corner to a survey of 3,000 acres made for John H. Robinson, and with three lines of same, S. 51 W. 38 poles to two lynns, S. 28 W. 34 poles to a locust, S. 31 W. 90 poles to two chestnuts oaks on a ridge, and leaving S. 32 E. 37 poles to a chestnut oak in a drain of the Pine Run, S. 14 W. 70 poles to two chestnut oaks and a gum, on the end of a laurel point facing the Pine Run, S. 47 E. 18 poles to two chestnuts and a gum, near a drain of same, S. 19 W. 52 poles to two chestnuts on the point of a ridge facing B. L. Rader's N. 73 E. 64 poles to two chestnut oaks near the top of the main mountains N. 50 E. 24 poles to a chestnut and chestnut oak, corner to said 950 acres, and with four lines of same N. 47½ E. 60 poles to a gum on a rich hill side, N. 14 W. 80 poles to a white oak on a hillside crossing Meadow Creek above the upper forks of the left hand fork, at 16 and 34 poles, thence N. 11½ E. 12 poles, crossing the spring branch near its mouth to two beeches on a hillside, N. 62 W. 34 poles, to the beginning, containing 135 acres, and being the same tract of land granted to John H. Robinson by the Commonwealth of Virginia by patent dated February 1st, [fol. 28] 1851. Said land is sold by the acre at twelve dollars per acre.

Witness the following signatures and seals:
J. Haymond Robinson. (Seal.) Jane Robinson. (Seal.)

STATE OF WEST VIRGINIA,
Nicholas County, To wit:

I, A. J. Horan, a Notary Public in and for said county and state do certify that J. Haymond Robinson and Jane Robinson, his wife, whose names are signed to the writing hereto annexed bearing date on the 17th day of July, 1903, have this day acknowledged the same before me in my said county.

Given under my hand this the 17th day of July, 1903.

A. J. Horan, Notary Public.

NICHOLAS COUNTY,
West Virginia:

Office of the Clerk of the County Court

August 8, 1903.

This deed from J. Haymond Robinson and wife to A. L. Hegarty was this day presented in this office and with the certificate of acknowledgment thereon admitted to record.

Teste:

Joseph A. Alderson, Clerk said Court.

(Endorsed:) District Court U. S., So. Dist. W. Va. Filed this 2nd day of July, 1923. Ira H. Mottesheard, Clerk.

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[fol. 29] EXHIBIT NO. 4 TO BILL OF COMPLAINT

This deed made this the 15th day of June 1904, between Abe Keffer of the first part and W. B. Stephenson and A. L. Hegarty of the second part.

Whereas there is a controversy as to the location of the line between the land of the party of the first part conveyed to him by R. G. Carden and the lands of the parties of the second part known as the Rhodes land, and the parties desiring to settle the matter amicably do so, and it is agreed that the line as run by I. A. Dix, Surveyor, shall be the line between them, Now, therefore, this deed Witnesseth:

That for and in consideration of one dollar in hand paid and other valuable consideration the party of the first part doth grant unto the parties of the second part with covenants of special warranty all his right, title and interest in and to the lands inside of the Rhodes survey as run by I. A. Dix, which lines are now painted; and the party of the first part also grants to the parties of the second part necessary rights of way through his land to haul the walnut timber situated on the interlock or land in controversy.

And the parties of the second part are to have the walnut timber cut on the land in controversy. And the parties of the second part release to said Keffer any right, title and interest to any land outside of the line run by Dix, and inside of the deed from Carden to said Keffer, and this agreed line applies only to the line between the Rhodes land and the Keffer land and no other.

Witness the following signature and seal:

Abe (his X mark) Keffer. (Seal.)

Witness: A. J. Horan.

STATE OF WEST VIRGINIA,
Nicholas County, To wit:

I, A. J. Horan, a Notary Public in and for said county and state, [fol. 30] do certify that Abe Keffer, whose name is signed to the writing above bearing date on the 15th day of June, 1904, has this day acknowledged the same before me in my said county.

Given under my hand this the 15th day of June, 1904.

A. J. Horan, Notary Public.

WEST VIRGINIA,
Nicholas County:

Court Clerk's Office

June 15", 1904.

This deed from Abe Keffer to W. B. Stephenson & al. was this day presented in this office and with the certificate of acknowledgment thereon admitted to record.

Teste:

Joseph A. Alderson, Clerk of said Court.

(Endorsed: District Court U. S., So. Dist. W. Va. Filed this 2nd day of July, 1923. Ira H. Mottesheard, Clerk.

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[fol. 31] EXHIBIT No. 5 TO BILL OF COMPLAINT

Know all men by these presents that whereas I, W. B. Stephenson have taken title to the undivided one-fourth of about five thousand and fifty acres of land in Nicholas County, West Virginia, bought by said A. L. Hegarty and W. B. Stephenson from Mary E. Rhodes as appears by a certain deed dated the — day of ——, 1902,

And whereas the purchase money for the said undivided one-fourth has been furnished by W. B. Stephenson, J. W. Stephenson, Jennie Stephenson, Emma D. Stephenson, Catharine J. Stephenson in equal proportions.

And whereas the said purchase of the said one-fourth was made for and on behalf of the said W. B. Stephenson, J. W. Stephenson,

Jennie Stephenson, Emma D. Stephenson, Catharine J. Stephenson and Mary R. Stephenson share and share alike.

Now, therefore I, W. B. Stephenson, do hereby declare that the title to the said lands is held by me the said W. B. Stephenson in trust for the said W. B. Stephenson, J. W. Stephenson, Jennie Stephenson, Emma D. Stephenson, Catharine J. Stephenson, and Mary R. Stephenson as tenants in common, share and share alike and I do hereby agree to convey to each of the said persons for whose benefits the said interests are held in trust his undivided share or interest in said land in fee simple whenever requested so to do.

And I do hereby agree *to* not to encumber the said premises in any way or manner except for the purchase money under this purchase made of said Mary E. Rhodes.

Witness my hand and seal this 31 day of December A. D. 1902.

W. B. Stephenson.

STATE OF PENNSYLVANIA,
County of Clearfield:

Before me a Notary Public in and for said county and state came W. B. Stephenson who did in due form of law acknowledge the foregoing Declaration of Trust to be his act that it might be recorded as such.

Witness my hand and official seal this 31st day of December A. D. 1902.

Adam Breth, Notary Public. Notary Public commission expires February 2, 1903. (Official Seal.)

(Endorsed:) District Court U. S., So. Dist. W. Va. Filed this 2nd day of July, 1923. Ira H. Mottesheard, Clerk.

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[fol. 32] EXHIBIT NO. 6 TO BILL OF COMPLAINT

This deed made this the 16th day of March, 1908, between A. L. Hegerty, unmarried, of the first part and W. B. Stephenson, Jennie Stephenson, Mary S. Weimer, John W. Stephenson and Emma S. Thomson, of the second part, all the parties of Clearfield County, Pennsylvania.

Whereas J. Hammond Robinson and wife in consideration of one thousand, six hundred and twenty dollars ($1,620.00) by deed dated July 17th, 1903, conveyed to the said A. L. Hegerty a certain tract of land situated on the head waters of Meadow Creek, a branch of Muddlety Creek, adjoining 3,000 acres patented to John H. Robinson and 950 acres granted to J. Haymond Robinson by the State of West Virginia, and the lands of others in Summersville District, Nicholas County, West Virginia, containing 135 acres, and being the same tract of land granted to John H. Robinson by the Commonwealth of Virginia, by patent dated February 1st, 1851, which deed is recorded in the office of the clerk of the county court of said county in Deed Book No. 37, on page 524, and for a more

particular description of said tract of land giving the metes and boundaries thereof, reference is here made to said deed, and,

Whereas the said W. B. Stephenson having paid one-fourth of the purchase money for said tract of land, and being entitled to one-fourth undivided thereof, and the deed for the whole thereof having been inadvertently executed to the said Hegerty for the whole of said tract of land; and at the request of the said W. B. Stephenson the said Hegerty executes this deed.

Now, therefore, this deed witnesseth: That for and in consideration of the purchase money paid by the said W. B. Stephenson as hereinbefore mentioned the said A. L. Hegerty doth grant, with covenants of special warranty, unto the parties of the second part, one-fourth undivided interest in and to said tract of 135 acres of land in the following proportions, to-wit: to W. B. Stephenson, Jennie Stephenson, Mary S. Weimer, each a one-twenty-fourth (1/24), [fol. 33] and to said John W. Stephenson and Emma S. Thomson, each a one-sixteenth (1/16), in and to said tract of land.

Witness the following signature and seal.

A. L. Hegerty. (Seal.)

STATE OF PENNSYLVANIA,
County of Clearfield, To wit:

I, H. A. Swan, J. P. in and for said county and state do certify that A. L. Hegerty, unmarried, whose name is signed to the writing hereto annexed, bearing date on the 16th day of March, 1908, has this day acknowledged the same before me in my said county.

Given under my hand and official seal on this the 26th day of June, 1908.

H. A. Swan, J. of P. My commission expires first Monday of May, 1913. (Seal.)

STATE OF WEST VIRGINIA,
Nicholas County:

Court Clerk's Office

August 4, 1909.

This deed was this day presented in said office, and thereupon, together with the certificate thereto annexed, is admitted to record.

Teste:

P. N. Wiseman, Clerk of said Court.

STATE OF WEST VIRGINIA,
Nicholas County:

Court Clerk's Office

June 28, 1923.

I, C. E. Stephenson, Clerk of said court do hereby certify that the foregoing is a true copy of a deed from A. L. Hegerty to W. B. Stephenson, et al., of record in my office, in Deed Book No. 49 page 294.

Given under my hand this the 28th day of June, 1923.

Teste:

C. E. Stephenson, Clerk Nicholas County Court.

(Endorsed:) District Court U. S., So. Dist. W. Va. Filed this 2nd day of July, 1923 Ira H. Mottesheard, Clerk.

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[fol. 34] EXHIBIT No. 7 TO BILL OF COMPLAINT

This deed made this the 26th day of February, 1908, between W. B. Stephenson and Sara W. Stephenson, his wife, parties of the first part and John W. Stephenson, Emma S. Thomson, Jennie Stephenson and Mary S. Weimer, parties of the first part, all the parties of Mahaffey, Clearfield County, Pennsylvania.

Whereas Mary E. Rhodes by Frank R. Ellis, her attorney-in-fact by deed dated March 5th, 1902, conveyed to A. L. Hagerty and said W. B. Stephenson, three certain tracts of land situated lying and being in Hamilton and Summersville Districts, in Nicholas County, West Virginia, on the head waters of Buffalo Creek, a branch of Elk River and Twenty Mile Creek, Peter's Creek and some of the West branches of Muddlety Creek, tributaries of Gauley River.

First tract containing, exclusive three reservations, 3096.9. The three reservations embraced within the lines of said tract which are excepted and reserved from the operation of said conveyance are 110.5 acres of Sinnet Rader's, 171.7 acres of John Rader and 112.1 acres of J. S. Hill.

Second tract containing 957.2 acres being the remainder of Lot No. 1 of Blair survey.

Third tract containing 789.97 acres. But the metes and bounds of the last described tract as here given leave out 124.43 acres of land conveyed to the late Charles R. Rhodes and bequeathed by him to the said Mary E. Rhodes because of a supposed interlock to that extent with the Ogden and Looney tract, aggregating 4,844.07 acres, which deed gives the metes and boundaries of said tracts of land and reference is here made to same for a more particular description of said tracts of land, which deed is recorded in the office of the clerk of the County Court of said Nicholas County, in deed book No. 39 on page 192. And upon a survey of said three tracts of land, after the conveyance aforesaid, it was found that there was a shortage of 165 acres, leaving a total acreage conveyed by said deed of 4,679.07, and

[fol. 35] Whereas a controversy arose between one Abe Keffer as to the location of a certain line or lines, and said Abe Keffer by deed dated June June 15th, 1904, conveyed to the said A. L. Hagerty and W. B. Stephenson his interest in any lands as surveyed by I. A. Dix, which lines were then painted, and also conveyed necessary rights of way to haul walnut timber situated on the interlock, and the said Hagerty and Stephenson to have all the Walnut timber

cut on the land in controversy; and the said Hagerty and Stephenson released to said Keffer all land outside of line run by Dix and inside of deed from Carden to Keffer which deed from Keffer to said Hagerty and Stephenson is recorded in said office in deed book No. 39 on page 200, and,

Whereas, James S. Craig, Michael C. Duffy and others by deed dated January 18th, 1906, conveyed to A. L. Hegarty and W. B. Stephenson a certain tract of land situated on the waters of Peters Creek in Summersville District, Nicholas County, West Virginia, adjoining the Benewine, Peyatte, McGee lands, the J. Haymond Robinson 950 acre survey, the tract of 135 acres patented to John H. Robinson the Rhodes 3,000 acres and the B. L. Rader land, containing 398½ acres, and for the metes and boundaries of said land reference is here made to said deed, which deed is recorded in said office in deed book No. 43, on page 53. And the said Mary E. Rhodes, by Frank R. Ellis, her atorney-in-fact, by the first named deed, and the said James S. Craig, Michael C. Duffy and others by the last named deed, conveyed to the said A. L. Hegarty three-fourths (¾) undivided in said tracts of land and to the said W. B Stephenson one-fourth (¼) undivided in said tract of land, so that the said Hegarty is now the owner of three-fourths (¾) undivided interests in said tracts of land and the said W. B. Stephenson is the owner of one-fourth (¼) undivided interests therein; and the said W. B. Stephenson desiring to convey a portion of his interest in said tracts of land to the parties of the second part executes this deed.

[fol. 36] Now, therefore, this deed witnesseth: That for and in consideration of one dollar in hand paid, the receipt of which is hereby acknowledged, and other valuable considerations, the parties of the first part do grant unto the parties of the second part, in the proportions hereinafter set out, the following undivided interests in and to the lands conveyed to the said A. L. Hegarty and W. B. Stephenson hereinbefore set out, to-wit:

To the said John W. Stephenson three twelfths (3/12) of one-fourth (¼); and to the said Emma S. Thomson three-twelfths (3/12) of one-fourth (¼); to Jennie Stephenson one-sixth (1/6) of one fourth (¼), and to Mary S. Weimer one-sixth (1/6) of one-fourth (¼), so therefore the parties of the first part convey by this deed to the said John W. Stephenson and Emma S. Thomson, each a one-sixteenth (1/16) in the whole of said lands and to the said Jennie Stephenson and Mary Mary S. Weimer each a one-twenty-fourth (1/24) undivided interest in said lands, leaving one-twenty-fourth (1/24) undivided interest still owned by the said W. B. Stephenson and not conveyed by this deed. The parties of the first part warrant specially the interests herein conveyed in said lands to the parties of the second part, because of the fact that he held same in trust for them.

Witness the following signatures and seals:

W. B. Stephenson. (Seal.) Sarah W. Stephenson. (Seal.)

STATE OF PENNSYLVANIA,
County of Clearfield, ss:

I, E. E. Clary, a notary Public in and for said County and State do certify that W. B. Stephenson and Sara W. Stephenson, his wife, whose names are signed to the writing above, bearing date on the 26th day of February, 1908, have this day acknowledged the same before me in my said county.

Given under my hand and official seal on this the 1st day of June, 1908.

E. E. Clary, N. P. My commission expires May, 1909. (Notarial Seal.)

[fol. 37] WEST VIRGINIA,
Nicholas County:

Court Clerk's Office

June 15, 1908.

This deed with the certificate thereon was this day admitted to record in said office.
Teste: Joseph A. Alderson, Clerk of said Court.

(Endorsed:) District Court U. S., So. Dist. W. Va. Filed this 2nd day of July, 1923. Ira H. Mottesheard, Clerk.

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[fol. 38] EXHIBIT NO. 8 TO BILL OF COMPLAINT

This deed made this 12th day of January, 1911, between W. B. Stephenson and Sarah W. Stephenson, his wife, of Mahaffey, Clearfield County and State of Pennsylvania, parties of the first part, and Emma S. Thomson, of La Jose, Clearfield County and State of Pennsylvania, party of the second part.

Whereas, Mary E. Rhodes, by Frank R. Ellis, her attorney-in-fact by deed dated March 5, 1902, conveyed — A. L. Hegerty and W. B. Stephenson three certain tract- of land situated, lying and being in Hamilton and Summersville districts, in Nicholas County, West Virginia, on the head waters of Buffalo Creek, a branch of Elk River and Twenty Mile Creek and Peters Creek and some of the west branches of Muddlety, tributaries of Gauley River.

The first tract containing exclusive of three reservations of three thousand ninety-six and nine tenths (3,096.9) acres. These three reservations embraced within the lines of said tract which are excepted and reserved from the operation of this conveyance are one hundred ten and five-tenths (110.5) acres of Sinnett Rader's one hundred seventy-one and seven-tenths (171.7) acres of John Rader and one hundred and twelve one-tenth (112.1) acres of J. S. Hill.

The second tract containing nine hundred fifty-seven and two-tenth- (957.2) acres, being the remainder of lot number one of Blair Survey.

The third tract containing seven hundred eighty-nine and ninety-seven one hundredths (789.97) acres, but the metes and bounds of this tract as here given omit one hundred twenty-four and forty-three-one hundredths (124.43) acres of the land conveyed to the late Charles R. Rhodes and bequeathed by him to the said Mary E. Rhodes because of a supposed interlock to that extent with the Ogden and Looney tracts aggregating forty-eight hundred and forty-four and seven one hundredths (4,884.07) acres, which deed gives the metes and bounds of said tracts of land and reference is here made to same for more particular description of said tracts of land, which [fol. 39] deed is recorded in the office of the County Court of said Nicholas County in Deed Book No. 39, page 192.

Upon survey of said three tracts of land, after the conveyance aforesaid, it was found that there was a shortage of one hundred sixty-five (165) acres, leaving a total acreage conveyed by said deed of forty-six hundred seventy-nine and seven one hundredths (4,679.07) acres.

Whereas, a controversy arose between one Abe Keiffer as to the location of a certain line or lines, and the said Abe Keiffer by deed dated June 15, 1904, conveyed to the said A. L. Hagarty and W. B. Stephenson his interest in any lands as surveyed by I. A. Dix, which lines were then painted, and also conveyed necessary rights of way to haul walnut timber situate on interlock and the said Hegarty and Stephenson to have all walnut timber cut on the land in controversy and the said Hegarty and Stephenson release to said Keiffer all land outside of line run by Dix from Carden to Keiffer, which deed from Keiffer to Hegarty and Stephenson is recorded in the office of the County Court of said Nicholas County in Deed Book No. 39, page 200.

Whereas, James S. Craig, Michael Duffy and others, by deed dated January 18, 1906, conveyed to A. L. Hegarty and W. B. Stephenson, a certain tract of land situated on the waters of Peters Creek inSummersville District, Nicholas County, West Virginia, adjoining the Benewine, Peyatte, McGee lands, the J. Haymond Robinson 950-acre survey, the tract of 135 acres patented to John H. Robinson, the Rhodes 3,000 acres and the B. L. Rader land, containing 398½ acres and for the metes and boundaries of said land reference is here made to the deed which is recorded in the office of the county court in said Nicholas County in Deed Book No. 43, page 53, and the said Mary E. Rhodes by Frank R. Ellis her attorney-in-fact, by the last mentioned deed and the said James S. Craig, Michael Duffy and others by the last named deed conveyed to the said A. L. Hegarty a three-fourths undivided interest in said tracts of land and [fol. 40] to the said W. B. Stephenson the remaining one-fourth undivided interest in said tracts of land.

Whereas, W. B. Stephenson and Sarah W. Stephenson, his wife, by deed dated the 26th day of February, 1908, recorded in the office of the County Court of said Nicholas County in Deed Book No. 48, page 51, conveyed to John W. Stephenson three-twelfths (3/12) of one-fourth (¼) of their undivided interest in said tracts of land;

to Emma S. Thomson three-twelfths (3/12) of one-fourth (¼) of their undivided interest in said tracts of land; to Jennie Stephenson one sixth (1/6) of one fourth (¼) of their undivided interest in said tracts of land; to Mary S. Weimer one-sixth (1/6) of one fourth (¼) of their undivided interest in said tracts of land. This left a one-twenty-fourth (1/24) undivided interest in said tracts of land remaining in the said W. B. Stephenson.

Whereas, J. Haymond Robinson conveyed a certain tract of land containing one hundred thirty-five (135) acres to A. L. Hegarty by deed dated the 17th day of July, 1903, the metes and bounds of which are described in said deed and reference is here made to same for a more particular description of said tract of land, which deed is recorded in the office of the County Court of said Nicholas County in Deed Book No. 37, page 524.

Whereas, W. B. Stephenson had paid one-fourth (¼) of the purchase money for said tract of one hundred and thirty-five (135) acres of land and was entitled to one-fourth (¼) of the interest thereof, and for that consideration and at the request of the said W. B. Stephenson the said A. L. Hegarty by deed dated 16th day of March, 1908, and recorded in the office of the County Court in said Nicholas County in Deed Book 49, page 294, conveyed this one-fourth (¼) interest in said tract of land as follows: To John W. Stephenson three-twelfths (3/12) of the one fourth (¼) of undivided interest of said tract of land; to Emma S. Thomson three-twelfths (3/12) of one undivided one-fourth (¼) of undivided interest in said tract of land: To Jennie Stephenson one-sixth (1/6) of one-fourth (¼) of [fol. 41] undivided interest of said tract of land; To Mary S. Weimer one-sixth (1/6) of one-fourth (¼) of undivided interest of said tract of land; To W. B. Stephenson one-twenty-fourth (1/24) of undivided interest of said tract of land.

Whereas, the said W. B. Stephenson desires to convey his undivided one-twenty-fourth (1/24) interest in the said four tracts of land to the party of the second part — executes this deed.

Now, therefore, this deed witnesseth, that for and in consideration of the sum of Three Thousand ($3,000.00) dollars in hand paid, the receipt of which is hereby acknowledged, and other valuable consideration, the said parties of the first part do grant, sell and convey unto the party of the second part an undivided one-twenty-fourth interest in and to the said four described tracts of land.

The said W. B. Stephenson and Sarah W. Stephenson, his wife, convenants to and with the said Emma S. Thomson, that they have the right to convey the said land to the grantee, and that they warrant generally the property hereby conveyed.

W. B. Stephenson. (Seal.) Sarah W. Stephenson. (Seal.)

STATE OF PENNSYLVANIA,
County of Clearfield, ss:

I, Andrew McQuown, a Notary Public in and for the said County and State aforesaid, do certify that W. B. Stephenson and Sarah W. Stephenson his wife, whose names are signed to the writing hereto

annexed, bearing date on the 12th day of January, 1911, have acknowledged the same before me in my county as their act and deed and desire the same to be recorded as such.

Given under my hand and official seal the 20th day of January, A. D. 1911.

Andrew McQuown, Notary Public. My commission expires at the end of the next session of the Legislature. (Notarial Seal.)

[fol. 42] STATE OF WEST VIRGINIA,
Nicholas County:

Court Clerk's Office

January 27, 1911.

This deed was this day presented in said office, and thereupon, together with the certificate thereto annexed, is admitted to record.

Teste:

P. N. Wiseman, Clerk.

(Endorsed:) District Court U. S., So. Dist. W. Va. Filed this 2nd day of July, 1923. Ira H. Mottesheard, Clerk.

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[fol. 43] EXHIBIT TO BILL OF COMPLAINT

SUMMONS AND SHERIFF'S RETURN

State of West Virginia to the sheriff of Nicholas County, Greeting:

We command you that you summon W. B. Stephenson, John W. Stephenson, Emma Thomson, Jennie Stephenson and Mary S. Weimer, to appear before the Judge of our circuit court for Nicholas County at Rules to be held in the Clerk's office of said Court, the first Monday in March next to answer a Bill in Chancery exhibited against them in said Court, by F. E. Cawley, and have then and there this writ and how you have executed it.

Witness Jennings J. Summers, Clerk of our said Circuit Court, at the Court House aforesaid, the 27th day of February, 1920, and in the 57th year of the State.

Jennings J. Summers, Clerk.

The within named W. B. Stephenson, John W. Stephenson, Emma Thomson, Jennie Stephenson, and Mary S. Weimer not found in my bailiwick, this 28th day of February, 1920.

W. E. Marto, S. N. C., by J. A. Hughes, Deputy.

## Order of Publication

State of West Virginia:

At rules held in the Clerk's Office of the Circuit Court of Nicholas County, on Monday the 1st day of March, 1920, the following order was entered:

In Chancery

F. E. Cawley, Plaintiff,

vs.

W. B. Stephenson, Emma Thomas, Jennie Stephenson, and Mary S. Weimer, Defendants

The object of the above entitled suit is to set aside and annul two certain deeds made by W. B. Stephenson and wife, the first [fol. 44] dated February 26th, 1908, and the second dated January 12th, 1911, wherein they conveyed a one-fourth undivided interest in four certain tracts of land situate in Nicholas County, West Virginia, in Summersville and Hamilton districts, known as the Hegarty-Stephenson land, and containing about — acres, to the defendants, John W. Stephenson, Emma Thomson, Jennie Stephenson, and Mary S. Weimer, and to subject said interest in said real estate to sale for the purpose of satisfying certain judgments recovered in the Court of Common Pleas, of Clearfield County, Pennsylvania, against the said W. B. Stephenson, which said judgments are in the name of said F. E. Cawley.

And it appearing by affidavit filed in this cause that the said W. B. Stephenson, John W. Stephenson, Emma Thomson, Jennie Stephenson and Mary S. Weimer are non-residents of this state, it is ordered that they do appear here within one month after the date of the first publication hereof and do what is necessary to protect their interests.

A copy. Teste:
Jennings J. Summers, Clerk. Brown, Wolverton & Ayres, Attorneys.

I, A. Lee Stewart, Editor and Publisher of The Nicholas Chronicle, a weekly newspaper published at Summersville, in the County of Nicholas, and State of West Virginia, do certify that the hereto attached "order of publication" in the Chancery Cause of F. E. Cauley, plaintiff, vs. W. B. Stephenson and others, defendants, was published in said newspaper once each week for four successive weeks, commencing on the 18th day of March, 1920.

Given under my hand this fifth day of May, 1920.
A. Lee Stewart, Editor and Publisher.

Fee for publication, $7.68.

[fol. 45] THE BILL OF COMPLAINT OF F. E. CAWLEY AGAINST W. B. STEPHENSON, JOHN W. STEPHENSON, EMMA S. THOMPSON, JENNIE STEPHENSON, AND MARY S. WEIMER

Filed in the Circuit Court of Nicholas County, West Virginia

To the Honorable Jake Fisher, judge of said court:

Plaintiff complains and says that on the 7th day of February, 1908, one, Geo. H. Lum, and the defendant, W. B. Stephenson, made their four promissory notes in writing, each in the sum of Five Thousand ($5,000.00) dollars, two of which said notes were payable on the 7th day of August, 1908, one of said notes was payable three years after date, and the other payable four years after date, all of the said four notes payable to the order of F. E. Cawley, your plaintiff, at Little Falls, in the State of Minnesota, with interest from date, and subscribed their names to the said notes and delivered them to plaintiff and thereby promised to pay to the order of plaintiff the sum of Twenty Thousand ($20,000.00) Dollars in the manner, and at the place, and upon the dates aforesaid; and plaintiff alleges that at the time the four promissory notes aforesaid were delivered to him, he also received from the defendant, W. B. Stephenson, with each of said notes, a certificate of Fifty (50) Shares of the Capital stock of the Northwestern Milling Company as collateral security for the payment of said notes.

Plaintiff further complaining says that after the delivery to him by the said defendant, W. B. Stephenson, of the four promissory notes, as aforesaid, for value received he assigned, set over, transferred and endorsed three of said notes to other persons, as follows: To C. J. Cawley one of said notes in the amount of Five Thousand ($5,000.00) Dollars, due and payable on August 7, 1908; to Sarah H. Cawley, one of said notes due and payable three years after date: [fol. 46] and to Frank Stanton Cawley one of said notes, due and payable four years after date.

Plaintiff further complaining says that the said Geo. H. Lum and the said W. B. Stephenson, having neglected and refused to pay the said promissory note still held by plaintiff, he, your plaintiff, on the 4th day of February, 1911, instituted his action in assumpsit in Court of Common Pleas for the County of Clearfield in the Commonwealth of Pennsylvania to recover of the defendants, Geo. H. Lum and W. B. Stephenson, the sum of Five Thousand ($5,000.00) Dollars, the face of said note; together with interest thereon from the 7th day of August, 1908, and the costs of the suit; that on the 18th day of February, 1911, the defendant W. B. Stephenson appeared and filed his affidavit of defense, claiming and pretending therein that he had a full and just defense to said action; that at the May term, 1911, of said court, the said defendant by his petition and affidavit secured the continuance of said action, and again at the December term thereof secured a continuance, that finally on the 13th day of September, 1915, plaintiff recovered a judgment predicated on said promissory note, in said court, against said defendants for the sum of Five Thousand ($5,000.00) Dollars, with

interest thereon from said 7th day of August, 1908, until *and* paid and costs thereof, amounting to $41.55; that on the 4th day of February, 1914, the said C. J. Cawley, the said Sarah H. Cawley and the said Frank Stanton Cawley, the several assignees of the three other promissory notes executed to plaintiff and by him transferred and assigned as aforesaid, each instituted his several action in the said court against the said Geo. H. Lum and the said W. B. Stephenson to recover the amount due on each note with interest due thereon; that on the 25th day of February, 1914, the defendant, W. B. Stephenson, appeared and filed his affidavit of defense to each of said actions, claiming and pretending as before that he had a full [fol. 47] and just defense to each and every of said actions; that on the 13th day of September, 1915, each of said plaintiffs in said actions recovered judgments predicated on the several promissory notes assigned to them as aforesaid, as follows: The said C. J. Cawley for the sum of Four Thousand and Five Hundred ($4,500.00) Dollars with interest from said 7th of August, 1908, until paid and costs thereof amounting to $20.25; the said Sarah H. Cawley for the sum of Five Thousand ($5,000.00) Dollars, with interest from said 7th day of August, 1908, until paid and costs thereof, amounting to $20.25; and the said Frank Stanton Cawley for the sum of Five Thousand ($5,000.00) Dollars, with interest from said 7th day of August, 1908, until paid, and costs thereof, amounting to $20.25.

Plaintiff further complaining says that for value received the several judgments aforesaid in favor of the said C. J. Cawley, the said Sarah H. Cawley, and the said Frank Stanton Cawley, respectively, were each and severally assigned, transferred and set over in writing bearing date on the 29th day of November, 1919, to your plaintiff, F. E. Cawley, and said assignment duly noted on the records of said court on the 19th day of January, 1920. All of which will more fully and at large appear from the exemplified record in each of said actions, to-wit: F. E. Cawley vs. George H. Lum and W. B. Stephenson, and Frank Stanton Cawley v. George H. Lum and W. B. Stephenson, Sarah H. Cawley vs. George H. Lum and W. B. Stephenson and C. J. Cawley vs. George H. Lum and W. B. Stephenson from the records of the said Court of Common Pleas of Clearfield County, duly authenticated, showing said four promissory notes, their assignments, and the judgments rendered on each of them and the assignments to your plaintiff of said judgments, and herewith filed, marked respectively, "Exhibit No. 1," "Exhibit No. 2." "Exhibit No. 3," and "Exhibit No. 4," and prayed to be read as part hereof; and plaintiff avers that said judgments are [fol. 48] still in full force and effect and remain wholly unpaid and entirely unsatisfied.

Plaintiff further complaining, says that on the 7th day of February, 1908, the defendant W. B. Stephenson, was the owner in fee of a one-fourth interest undivided in certain tracts of land, situate on the headwaters of Buffalo Creek, Twenty Mile Creek, Peters Creek, and some of the west branches of Muddlety Creek, in Summersville and Hamilton Districts, in Nicholas County, West Virginia, and conveyed to the said W. B. Stephenson and one A. L. Hagerty as

follows: three tracts aggregating 4679.07 acres, conveyed from Mary E. Rhodes, by Frank R. Ellis, her attorney, to said defendant, and said Hagerty by deed bearing date of March 5th, 1902, and of record in the office of the Clerk of the County Court of Nicholas County, West Virginia, in Deed Book No. 39, at page 192; a tract of 398½ acres conveyed from James Craig and others by deed bearing date of January 18th, 1906, and of record in said office in Deed Book No. 43, at page 53; and a tract of 135 acres conveyed from J. Raymond Robinson to said Hagerty by deed bearing date of July 17th, 1903, and of record in said office in Deed Book No. 37, at page 524.

Plaintiff further complaining says that in the year 1907 the said defendant, W. B. Stephenson, with others, went into the flour milling business at Little Falls in the State of Minnesota, and incorporated the Northwestern Milling Company at that place; that the other incorporators had little money, but had experience in the business, and said Stephenson was to furnish the money or credit on which to obtain money; that in order to furnish working capital for this milling company the said Stephenson issued a large number of his notes, endorsed by the Northwestern Milling Company, and these notes were sold readily, as the said Stephenson owned valuable real estate in Pennsylvania, Iowa and West Virginia, and represented by a sworn statement that his net worth was something over $200,000.00; that soon after the issue of some of these notes, in [fol. 49] 1907, the said defendant, W. B. Stephenson, conveyed to his sister, Emma Thomson, his real estate in the counties of Benton and Tama, State of Iowa, by deed of April 22nd, 1907; that the Northwestern Milling Company did not succeed in business, and other notes were issued in 1908, by said defendant, W. B. Stephenson, including the four said notes of $5,000.00 each, bearing date on February 7th, 1908, payable to the order of F. E. Cawley, your plaintiff, as hereinbefore set out; that soon after the execution of said notes to plaintiff, the said W. B. Stephenson conveyed to his brother, said John W. Stephenson, three-twelfths of his one-fourth interest in said real estate in Nicholas County, to his sister, the said Emma Thomson, three-twelfths of said one-fourth therein; to his sister, said Mary S. Weimer, one-sixth of said one-fourth therein, and to said Jennie Stephenson, one-sixth of said one-fourth therein, by deed bearing date February 26, 1908, and of record in said office in Deed Book No. 48, at page 51, leaving to the said W. B. Stephenson a one-twenty-fourth interest in said lands; that said W. B. Stephenson paid the first instalment of interest on said notes held by plaintiff, and made one partial payment of Five Hundred ($500.00) Dollars on one of said notes, as will appear from the exemplified records herewith exhibited; that no further payment of interest or principal was made and when pressed for payment and when your plaintiff was preparing to bring suit on said notes, the said W. B. Stephenson, by deed bearing date on January 12th, 1911, conveyed his remaining one-twenty-fourth interest in said Nicholas County lands to his sister, defendant, Emma Thomson, which deed is of record in said Nicholas County Court Clerk's Office in Deed Book No. — at page —; that suit was instituted as aforesaid on

said notes; and that the said defendant W. B. Stephenson, after interposing a pretended defense and after continuing said action for a long time, confessed judgment and abandoned all defense thereto.

[fol. 50] Plaintiff further complaining says that at the time of the conveyance of February 26th, 1908, the defendant John W. Stephenson, lived in Minnesota, and had full knowledge of the financial condition of said Northwestern Milling Company, and knew of his said brother, W. B. Stephenson, issuing the said notes of February 7th, 1908; that the sisters, the said Emma Thomson, the said Jennie Stephenson, and the said Mary S. Weimer, likewise knew of said transactions, and they and their said brother knew that said Northwestern Milling Company was insolvent at the time of this conveyance, and knew that said W. B. Stephenson was indebted in large sums for which he had executed his notes, and knew that there was a move to throw him into bankruptcy. And plaintiff charges that the said conveyance of February 26th, 1908, made by the said W. B. Stephenson, was for the sole purpose of hindering, delaying and defrauding his creditors, and especially to evade, hinder and delay the payment of said promissory notes of February 7th, 1908, of which said fraudulent intent the said defendants all had notice; and that said notes were then a subsisting obligation against the said W. B. Stephenson.

Plaintiff further complaining says that at the time of the conveyance of the one-twenty-fourth undivided interest in said lands, by deed of January 12th, 1911, two of said notes of February 7th, 1908, had long been due and unpaid, and a large sum of interest had accrued on all of said four notes and was due and unpaid; that your plaintiff was demanding payment and the said W. B. Stephenson anticipated the bringing of the action by plaintiff instituted in said Common Pleas Court of Clearfield County, as aforesaid, and said conveyance by defendant, W. B. Stephenson, to his sister defendant, Emma Thomson, was made for the sole purpose of hindering, delaying and defrauding the creditors of said Stephenson, and more especially to evade, hinder and delay the payment of said promissory notes of February 7th, 1908, of which fraudulent intent and pur-[fol. 51] pose the said Emma S. Thomson had full notice and which notes were then a subsisting obligation against the said W. B.Stephenson; that said deed was executed on the 12th day of January, 1911, and caused to be recorded on the 27th day of January, 1911, about one week before the institution of said action. And plaintiff here charges that defendant Emma Thomson had no means to purchase said interest in said real estate, and paid no consideration therefor, but that she conspired and colluded with her said brother to pass said interest out of his name and to keep the same away from his creditors and especially to hinder, delay and defraud your plaintiff.

And plaintiff further complaining says that the transfer of the Iowa properties by the said W. B. Stephenson to his said sister, the defendant, Emma S. Thomson, by deed of April 22nd, 1907; the conveyance of the five-twenty-fourth interest in the lands in Nicholas County by said W. B. Stephenson to his said brothers and sisters, the

defendants herein, by deed of February 26th, 1908; and the conveyance of the remaining one-twenty-fourth interest in said lands, by said W. B. Stephenson to his sister, the said Emma S. Thomson, by the deed of January 12th, 1911, were all made by the said grantor in pursuance of his fraudulent design to hinder, delay and defraud his creditors, and especially to hinder, delay and evade the payment of said promissory notes of February 7th, 1908. And plaintiff charges, upon information and belief, that the said defendants, each had notice of said fraudulent purpose, and connived and conspired with said grantor to carry out his fraudulent designs; that no consideration passed in said conveyances; that said deeds were voluntary and fraudulent; and that said W. B. Stephenson at the time of said conveyances was and still is insolvent, of all which said defendants had notice.

The said deeds of March 5th, 1902, July 17th, 1903, January 18th, [fol. 52] 1906, and the deed from Abe Keifer to said Hegarty and Stephenson, dated on June 15th, 1904, showing the conveyance of the one-fourth interest in said lands to said W. B. Stephenson, and the said deeds of February 26th, 1908, and of January 12th, 1911, by which the said W. B. Stephenson conveyed his said interest to his said brother and sisters as aforesaid, are filed herewith as part hereof as "Exhibit No. 5," "Exhibit No. 6," "Exhibit No. 7," "Exhibit No. 8," "Exhibit No. 9," and "Exhibit No. 10," respectively.

Your plaintiff therefore prays that the deeds of February 26th, 1908, and of January 12th, 1911, be set aside as fraudulent and void so far as plaintiff's rights and interests are concerned; that said one-fourth interest in said lands in Nicholas County be sold to satisfy said judgments and the costs of this suit, and grant to your plaintiff general relief.

F. E. Cawley, by Counsel. Brown, Wolverton & Ayres, Attorneys for Plaintiff.

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AFFIDAVIT OF THOMAS W. AYRES FOR ORDER OF PUBLICATION

[Title omitted]

Thomas W. Ayres, being by me first duly sworn says that he is attorney for the plaintiff in the above styled cause and that the said defendants, W. B. Stephenson, John W. Stephenson, Emma Thomson, Jennie Stephenson and Mary S. Weimer are non-residents of the State of West Virginia.

Thomas W. Ayres.

[fol. 53] Taken, sworn to and subscribed before me this the 27th day of February, 1920. Jennings J. Summers, Clerk of the Circuit Court of Nicholas County, West Virginia.

## Attachment Affidavit of Thomas W. Ayres

[Title omitted]

Thomas W. Ayres, being by me first duly sworn, upon his oath says that he is attorney for F. E. Cawley, plaintiff in the above styled cause; that he, as such attorney, has instituted a suit in equity against the defendants, W. B. Stephenson, John W. Stephenson, Emma Thomson, Jennie Stephenson, and Mary S. Weimer, in the Circuit Court of Nicholas County, West Virginia, to recover of said W. B. Stephenson, a debt arising out of contract in the sum of $19,602.10, with interest from the 7th day of August, 1908, comprising a total amount to this date of $33,222.10. Also to set aside and annual two certain deeds made by the said W. B. Stephenson and wife, the first bearing date February 26, 1908, and the second bearing date January 12, 1911, wherein they conveyed a one-fourth interest undivided in four certain tracts of land in said Nicholas County to defendants, John W. Stephenson, Emma Thomson, Jennie Stephenson, and Mary S. Weimer, and to subject said interest in said real estate of said W. B. Stephenson to sale for the purpose of satisfying any recovery in such suit. That on the 13th day of September, 1915, the [fol. 54] said F. E. Cawley recovered a judgment in the Court of Common Pleas in and for the County of Clearfield, in the Commonwealth of Pennsylvania against the said W. B. Stephenson and one George H. Lum for $5,000.00, with interest from August 7, 1908, and $41.25 costs of suit; that on the same date one C. J. Cawley recovered a judgment in said court against the said W. B. Stephenson and said George H. Lum for $4,500.00, with interest from August 7, 1908, and $20.25 costs of suit; that on the same date one, Frank Stanton Cawley, recovered a judgment in said court against the said W. B. Stephenson and said George H. Lum for $5,000.00, with interest from August 7, 1908, and $20.25 costs of suit; and that on the same date one, Sarah H. Cawley, recovered a judgment in said court against the said W. B. Stephenson and said George H. Lum for $5,000.00, with interest from August 7, 1908, and $20.25 costs of suit; that the said last three judgments named were on the 19th day of January, 1920, duly assigned to said F. E. Cawley, who is now the owner of the same; that said judgments, with the interest and costs thereon, remain unpaid and are due from said W. B. Stephenson to said F. E. Cawley; that said W. B. Stephenson, as the said F. E. Cawley charges, and as affiant believes, conveyed by the two deeds aforesaid, for the purpose of avoiding said debts and to prevent the enforcement and collection of said judgments, his one-fourth interest in said tracts of land to John W. Stephenson, Emma Thomson, Jennie Stephenson and Mary S. Weimer; that by reason of the circumstances connected therewith, the said conveyances are voluntary, null and void, and the said one-fourth interest in said real estate is still subject to any attachment and decrees against, or debts of, the said W. B. Stephenson; that affiant believes that the said F. E. Cawley is justly entitled to recover in said suit, at least, the amount

of $33,222.10, and affiant believes the following ground exists for the said attachment; that the said W. B. Stephenson, John W. [fol. 55] Stephenson, Emma Thomson, and Mary S. Weimer are non-residents of the State of West Virginia.

Thomas W. Ayres.

Taken, sworn to and subscribed before me this 27th day of February, 1920. Jennings J. Summers, Clerk of the Circuit Court of Nicholas County, West Virginia.

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ORDER OF ATTACHMENT

[Title omitted]

To the sheriff of Nicholas County, Greeting:

The plaintiff in this case having filed his affidavit as required by law, the Sheriff of the County of Nicholas, or any constable of any district therein, to whom this order may come, is required, in the name of the State of West Virginia, to attach the estate of the defendant W. B. Stephenson, sufficient to pay the sum of $33,222.10, and the costs of this suit, and make return of his proceedings under this order at Rules to be held for the Circuit Court of said County on the 1st day of March, 1920.

Witness, Jennings J. Summers, Clerk of said Court, this 27th day of February, 1920.

Jennings J. Summers, Clerk.

Received the within order of attachment on the 27th day of February, 1920, at 7:30 P. M.

W. E. Morton, S. N. C., by J. A. Hughes, Deputy.

[fol. 56] Executed the within order of attachment the 28th day of February, 1920, at 11:00 o'clock A. M., by levying the same upon a one-fourth interest undivided in each of the following four tracts of land, to-wit:

First. A tract of 4,679.07 acres, located in Hamilton and Summersville Districts of Nicholas County, West Virginia, on the headwaters of Buffalo Creek, a branch of Elk River, and Twenty Mile creek and Peters Creek, and some of the west branches of Muddlety Creek, tributaries of Gauley River, and being the same lands conveyed by Mary E. Rhodes, by Frank R. Ellis, her attorney in fact, to A. L. Hagerty and W. B. Stephenson, by deed dated March 5th, 1902, and of record in the office of the Clerk of the County Court of Nicholas County, West Virginia. Said land being described in said deed as containing three tracts.

Second. A certain tract of land and the rights of way connected therewith, being the same land and rights of way conveyed by Abe

Keifer to A. L. Hagerty and W. B. Stephenson, by deed dated June 15th, 1904, and recorded in the office of the Clerk of the County Court of said Nicholas County, West Virginia.

Third. A certain tract of 398-1/2 acres, situate in Summersville District, Nicholas County, West Virginia, on the waters of Peters Creek, adjoining the Brenewine, Peyatte and McGee land, the J. Haymond Robinson 950 acre survey, a tract of 135 acres patented to John H. Robinson, the Rhodes 3,000 acres and the B. L. Rader land, and being the same tract of land conveyed to A. L. Hagerty and W .B. Stephenson by James S. Craig, Michael Duffy and others by deed dated January 8th, 1906, and of record in said county Clerk's office of said Nicholas County, West Virginia.

The three above described tracts of land being the same tracts of land a five-twenty-fourth interest undivided in which was conveyed by W. B. Stephenson and wife to John W. Stephenson, Emma Thom-
[fol. 57] son, Jennie Stephenson, and Mary S. Weimer, by deed dated the 26th day of February, 1908, and of record in the office of the Clerk of the County Court of Nicholas County, West Virginia, in the following proportions, viz:

To John W. Stephenson an undivided 3/12 of an undivided ¼.
To Emma Thomson an undivided 3/12 of an undivided ¼.
To Jennie Stephenson an undivided 1/6 of an undivided ¼.
To Mary S. Weimer an undivided 1/6 of an undivided ¼.

Fourth. A certain tract of land containing 135 acres, lying on the head waters of Peters Greek and the head waters of Meadow Creek, a branch of Muddlety, adjoining 3,000 acres patented to John H. Robinson, and being the same tract of land conveyed by J. Haymond Robinson and others to A. L. Hagerty by deed dated the 17th day of July, 1903, and of record in the County Court Clerk's office of said county; and the same tract of land a one-fourth interest undivided in which was conveyed by A. L. Hagerty to W. B. Stephenson, Emma Thomson, Jennie Stephenson, Mary S. Weimer and W. B. Stephenson in the following proportions, viz:

To John W. Stephenson an undivided 3/12 of an undivided ¼,
To Emma S. Thomson an undivided 3/12 of an undivided ¼,
To Jennie Stephenson an undivided 1/6 of an undivided ¼,
To Mary S. Weimer an undivided 1/6 of an undivided ¼.
To W. B. Stephenson an undivided 1/24 interest,

said deed bearing date March 16th, 1908, and of record in the office of the Clerk of the County Court of Nicholas County, West Virginia.

The four above described tracts of land being the same tracts of land a one-twenty-fourth interest undivided in which were conveyed by W. B. Stephenson and Sarah M. Stephenson, his wife to Emma S. Thomson, by deed dated January 12th, 1911, and of record in said county clerk's office of said Nicholas County, West Virginia.

W. E. Morton, S. N. C., by J. A. Hughes, Deputy.

[fol. 58] [Title omitted]

JUDGMENT

This cause came on this day to be heard upon the order of publication duly executed as to the defendants, who are non-residents and have been regularly proceeded against as such; upon the bill and its exhibits duly filed at rules, the decree nisi properly taken thereon and regularly set for hearing by the plaintiff; upon the affidavit filed herein for an attachment; upon the attachment issued herein, the levy thereof and return thereon made by the officer levying the same; and upon the arguments of counsel; upon consideration of all which the court is of opinion to and doth find that there is now due and owing from the defendant, W. B. Stephenson, to the plaintiff, on account of the debt evidenced by *by* the four certain judgments in the bill and proceedings herein fully set out, including the interest thereon to this date, after allowing all payments, credits and sets-off to which the defendant is entitled, the sum of $34,285.60, and that the said plaintiff ought to recover of and from the said defendant, W. B. Stephenson, the said sum of $34,285.60, with interest thereon from this date until paid.

It is therefore, adjudged, ordered and decreed that the plaintiff, F. E. Cawley, do recover of and from the defendant, W. B. Stephenson, the said sum of $34,285.60, the aggregate amount of said judgments, including the interest thereon to this date and the costs awarded thereon with interest on said aggregate amount from this date until paid.

[fol. 59] And it further appearing to the satisfaction of the court from the papers and evidence in this case that the said deed from W. B. Stephenson and Sarah Stephenson, his wife, to John W. Stephenson, Emma S. Thompson, Jennie Stephenson, and Mary S. Weimer, bearing date the 26th day of February, 1908, conveying to the said John W. Stephenson three-twelfths of a one-fourth undivided interest, to the said Emma S. Thompson three-twelfths of a one-fourth undivided interest, to the said Jennie Stephenson one-sixth of an undivided one-fourth interest, and to the said Mary S. Weimer a one-sixth of an undivided one-fourth interest in the several tracts of land described in said deed, and the deed from W. B. Stephenson and Sarah W. Stephenson, his wife, to Emma S. Thomson, bearing date *one* the 12th day of January, 1911, conveying a one-twenty-fourth interest in the lands therein described were made to hinder, delay and defraud the creditors of the said W. B. Stephenson and especially the plaintiff, F. E. Cawley, in respect to the debt and demand herein adjudged to said plaintiff, it is therefore further adjudged, ordered and decreed that the said deeds, bearing date as aforesaid, be and the same are hereby set aside and held for naught, but so far only as the said debt and demand of said plaintiff, F. E. Cawley is concerned.

And it further appearing to the court that this is a proceeding by order of publication and attachment of the property of the said defendant found in this county, without any personal service on the

defendants, and the said defendants not having entered their
arance to this action, the court doth not enter any personal de-
against the said defendant, W. B. Stephenson; but doth find and
adjudge order and decree that the property of the said defend-
W. B. Stephenson, levied on of said attachment is liable to the
nent of the said sum of $34,285.60, with interest thereon from
date until paid, and the costs of this suit and attachment issued
in: and it further appearing to the court that there was levied
60] upon, under and by virtue of the said order of attachment
in set out the following real estate; A one-fourth interest un-
ded in each of the following four tracts of land to-wit:

irst. A tract of 4,679 acres, located in Hamilton and Summers-
Districts of Nicholas County, West Virginia, on the head waters
Buffalo Creek, a branch of Elk River, and Twenty Mile and
rs Creek, and some of the west branches of Muddlety Creek,
utaries of Gauley River, and being the same lands conveyed by
y E. Rhodes, by Frank R. Ellis, her attorney in fact, to A. L.
gerty, and W. B. Stephenson, by deed dated March 5th, 1902, and
ecord in the office of the Clerk of the County Court of Nicholas
nty, West Virginia. Said land being described in said deed as
taining three tracts.

econd. A certain tract of land and the rights of way connected
ewith, being the same land and rights of way conveyed by Abe
fer to A. L. Hagerty and W. B. Stephenson, by deed dated June
h, 1904, and — record in the office of the Clerk of the County
rt of said Nicholas County, West Virginia.

Third. A certain tract of three hundred and ninety-eight and one
f acres, situate in Summersville District, Nicholas County, West
ginia, on the waters of Peters Creek, adjoining the Brenewine,
atte, and McGee land, the J. Haymond Robinson 950 acre sur-
, a tract of 135 acres patented to John H. Robinson, the Rhodes
00 acres and the B. L. Rader land, and being the same tract of
d conveyed to A. L. Hagerty and W. B. Stephenson by James S.
ig, and Michael Duffy and others by deed dated January 8th,
06, and of record in said county clerk's office of said Nicholas
nty, West Virginia.

The three above described tracts of land being the same tracts of
d a five-twenty-fourth interest undivided in which was conveyed
W. B. Stephenson and wife to John W. Stephenson, Emma
omson, Jennie Stephenson, and Mary S. Weimer, by deed dated
l. 61] the 26th day of February, 1908, and of record in the office
the Clerk of the County Court of Nicholas County, West Virginia,
he following proportions, viz:

To John W. Stephenson and undivided 3/12 of and undivided
e-fourth.

To Emma Thomson an undivided 3/12 of an undivided one-
rth.

To Jennie Stephenson an undivided 1/6 of and undivided one-
rth.

To Mary S. Weimer and undivided 1/6 of an undivided one-fourth.

Fourth. A certain tract of land containing 135 acres, lying on the head waters of Peters Creek and the head waters of Meadow Creek, a branch of Muddlety, adjoining three-thousand acres patented to John H. Robinson, and being the same tract of land conveyed by J. Haymond Robinson and others to A. L. Hagerty by deed dated the 17th day of July, 1903, and of record in the county court clerk's office of said county; and the same tract of land a one-fourth interest undivided in which was conveyed by A. L. Hagerty to W. B. Stephenson, Emma Thomson, Jennie Stephenson, Mary S. Weimer and W. B. Stephenson in the following proportions, viz:

To John W. Stephenson and undivided 3/12 of an undivided one-fourth,
To Emma S. Thomson an undivided 3/12 of an undivided one-fourth,
To Jennie Stephenson an undivided 1/6 of an undivided one-fourth,
To Mary S. Weimer an undivided 1/6 of an undivided one-fourth,
To W. B. Stephenson an undivided 1/24 interest,

said deed bearing date March 16th, 1908, and of record in the office of the Clerk of the County Court of Nicholas County, West Virginia.

The four above described tracts of land being the same tracts of land a 1/24 interest undivided in which were conveyed by W. B. [fol. 62] Stephenson and Sarah W. Stephenson, his wife, to Emma S. Thomson, by deed dated January 12th, 1911, and of record in said county clerk's office of said Nicholas County, West Virginia. All the above described property belonging to the said defendant, W. B. Stephenson, and having been levied upon to satisfy the plaintiff's said debt and demand; and it appearing to the satisfaction of the court that the property is still under the levy of said attachment, and is liable to the payment of said debt and claim of the plaintiff, it is therefore adjudged, ordered and decreed that the said W. B. Stephenson do pay unto the said F. E. Cawley within thirty days from the rising of this court the said sum of $34,285.60 with legal interest thereon from this date until paid and also the costs of this suit and attachment issued therein; and in default thereof the said property, or so much thereof as may be necessary, be sold to pay the plaintiff's said debt and interest thereon from this date, and the costs of this suit and attachment issued therein.

And it is further adjudged, ordered and decreed that for the purpose of making such sale the court doth hereby appoint, W. G. Brown, J. M. Wolverton and T. W. Ayres, as Special Commissioners, with power in either to act, who shall advertise the time, terms and place of such sale for four successive weeks in the Nicholas Republican, a weekly newspaper published in this county, and which sale shall be made upon the following terms: One-third of the purchase price cash in hand on the day of sale; the remainder in two equal installments due in one and two years from the date of the sale with

interest from date, evidenced by promissory notes, and the Special Commissioners to retain the title to said land to secure the payment of said notes.

But before said special commissioners shall make such sale they shall execute a bond with approved security before the Clerk of this [fol. 63] court in the penalty of $30,000.00, conditioned for the faithful performance of their duties as such special commissioners, and to account for and pay over all money which may come into their hands by virtue of such sale.

And it is further adjudged, ordered and decreed that before said sale be made, the said plaintiff or some one for him, shall give bond with sufficient security before the Clerk of this court in the penalty of $30,000.00, conditioned that the plaintiff will perform such future order as may be made by the court in this suit in case the said defendants shall hereafter appear and make defense herein within the time prescribed by law; and the said W. G. Brown, J. M. Wolverton and T. W. Ayres, Special Commissioners, as aforesaid, shall report to this court at the next term thereof, all real estate they may have sold under this decree, with the name of the purchaser, the sum for which it sold and the time and place of such sale.

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[fol. 64] COMMISSIONER'S SALE OF VALUABLE REAL ESTATE

Pursuant to a decree of the Circuit Court of Nicholas county, made in the Chancery cause of F. E. Cawley, Plaintiff, vs. W. B. Stephenson, John W. Stephenson, Emma Thomson, Jennie Stephenson and Mary S. Weimer, Defendants, we will on the 18th day of May, 1921, at the Front Door of the Court House of Nicholas County, proceed to sell at public auction to the highest bidder a one-fourth interest undivided in each of the following three tracts of land:

First. A tract of 4,679 acres, located in Hamilton and Summersville Districts of Nicholas County, West Virginia, on the head waters of Buffalo Creek, a branch of Elk River, and Twenty Mile and Peters Creek, and some of the west branches of Muddlety Creek, tributaries of Gauley River, and being the same lands conveyed by Mary E. Rhodes, by Frank R. Ellis, her attorney in fact, to A. L. Hagerty and W. B. Stephenson by deed dated March 5th, 1902, and of record in the office of the Clerk of the County Court of Nicholas County, West Virginia, in Deed Book No. 39 at page 192. Said land being described in said deed as containing three tracts.

Second. A certain tract of land and the rights of way connected therewith, being the same land and rights of way conveyed by Abe Keifer to A. L. Hagerty and W. B. Stephenson, by deed dated June 15th, 1904, and of record in the office of the Clerk of the County Court of Nicholas County, West Virginia.

Third. A certain tract of three hundred and ninety-eight and one-half acres, situate in Summersville District, Nicholas County, West Virginia, on the waters of Peters Creek, adjoining the Brenewine,

Peyatte and McGee lands, the J. Haymond Robinson 950 acres survey, a tract of 135 acres patented to John H. Robinson, the Rhodes 3,000 acres and the B. L. Rader land, and being the same tract of land conveyed to A. L. Hagerty and W. B. Stephenson by James S. Craig and Michael Duffy and others by deed dated January 18th, [fol. 65] 1906, and of record in the office of the Clerk of the County Court of Nicholas County, West Virginia, in Deed Book No. 43 at page 53.

The three above described tracts of land being the same tracts of land a five-twenty-fourth interest undivided in which was conveyed by W. B. Stephenson and wife to John W. Stephenson, Emma Thomson, Jennie Stephenson, and Mary S. Weimer, by deed dated the 26th day of February, 1908, and of record in the office of the Clerk of the County Court of Nicholas County, West Virginia, in Deed Book No. 48 at page 51.

And also a one twenty-fourth interest undivided in the follow- tract of land:

A certain tract of land containing one hundred and thirty-five (135) acres, lying on the head waters of Peters Creek, and the head waters of Meadow Creek, a branch of Muddlety, adjoining three thousand acres patented to John H. Robinson, and being the same tract of land conveyed by J. Haymond Robinson and others to A. L. Hagerty by deed dated the 17th day of July, 1903, and of record in the office of the Clerk of the County Court of Nicholas County, West Virginia, in Deed Book No. 37 at page 524; and the same tract or parcel a one-fourth interest undivided in which was conveyed by A. L. Hagerty to W. B. Stephenson, Emma Thomson, Jennie Stephenson, Mary S. Weimer and W. B. Stephenson, by deed dated the 16th day of March, 1908, and of record in the office of the Clerk of the County Court of Nicholas County, West Virginia, in Deed Book No. 49 at page 294.

The four above described tracts of land being the same tracts of land a one-twenty-fourth interest undivided in which were conveyed by W. B. Stephenson and Sarah W. Stephenson, his wife, to Emma S. Thomson, by deed dated January 12th, 1911, and of record in said County Clerk's office of said Nicholas County, in Deed Book No. 51 at page 563.

[fol. 66] Terms of Sale: The purchaser will be required to pay one-third of the purchase money cash in hand on the day of sale, and the remainder in two equal installments due in one and two years from day of sale, with interest from date evidenced by promissory notes and the title to said interest to be retained to secure the payment of said notes.

W. G. Brown, J. M. Wolverton, T. W. Ayres, Special Commissioners.

STATE OF WEST VIRGINIA,
County of Nicholas, To wit:

I, J. O. Dodrill, Clerk of the Circuit Court of said county, do certify that W. G. Brown, J. M. Wolverton and T. W. Ayres, Commis-

sioners appointed to make sale of the lands in the above mentioned cause have given bond and security as required by law before me in said cause.

Teste:

J. O. Dodrill, Clerk of the Circuit Court of Nicholas County.

[fol. 67] I, J. J. Dotson, Editor and Publisher of the Nicholas Republican, a weekly newspaper published at Richwood, in the County of Nicholas, and State of West Virginia, do certify that the hereto attached in the Chancery Cause of W. B. Cowther vs. W. B. Stephenson & et als. Commissioner's sale notice was published in said newspaper once in each week for 4 successive weeks commencing on the 7 day of April, 1921.

Given under my hand this 12 day of May, 1921.

Jas. J. Dotson, Editor and Publisher.

Fee for publication, $42.20.

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[fol. 68] [Title omitted]

ORDER AFFIRMING APPROVAL OF BOND

The action of the Clerk in this day approving the bond executed by F. E. Cawley, principal, and National Surety Company, surety, in the penalty of Thrity Thousand Dollars ($30,000.00) in the above styled cause, conditioned that the plaintiff, F. E. Cawley shall perform such future orders as may be made by the court in this suit in case the said defendants shall hereafter appear and make defense in said suit within the time prescribed by law, is hereby ratified and confirmed.

[fol. 69] In Chancery

F. E. CAWLEY, Plaintiff,

vs.

W. B. STEPHENSON et als., Defendants

This cause came on this day to be further heard upon the former orders and decrees made therein; upon the former proceedings had therein; and the report of sale of Special Commissioners, W. G. Brown, J. M. Wolverton and T. W. Ayres, heretofore appointed to make sale of the real estate under the order of attachment issued herein and levied thereon, and which report is now filed in this cause, and there being no exceptions to said report and the court perceiving no just grounds of exceptions thereto, and no good cause being shown for setting the sale aside reported therein, it is therefore adjudged, ordered and decreed that said report of the sale therein mentioned be, and the same is hereby ratified and confirmed.

And it appearing from said report that H. L. Kirtley and H. W. Herold became the joint purchasers of said real estate sold by said Special Commissioners under said attachment; that said H. L. Kirtley and H. W. Herold have complied with the terms of the decree directing said sale by paying Twelve Thousand Nine Hundred Dollars ($12,900.00) in cash, being one-third of the purchase money, and have executed their two notes each in the sum of Twelve Thousand Nine Hundred Dollars ($12,900.00), payable in one and two years respectively, with interest, for the residue of the purchase money.

It is adjudged, ordered and decreed that out of the proceeds of said payment that said Special Commissioners do further pay the costs of this suit and the costs of said sale, including a commission of five per cent (5%) to said commisioners, as well also as the cost of suing out the attachment herein and all the proceedings therewith connected; and that the residue thereof, as well as the proceeds [fol. 70] of said notes be applied to the payment of plaintiff's debt as determined by a former order herein and that said Special Commissioners be, and they are hereby authorized to do whatever may be necessary to collect said notes, even to the bringing of suits for that purpose.

It is further adjudged, ordered and decreed that when said deferred installment of purchase money are fully paid that said W. G. Brown, J. M. Wolverton and T. W. Ayres, who are hereby appointed Special Commissioners for the purpose, with power in either to act, do make, execute, acknowledge and deliver for record an apt and sufficient deed, with covenants of special warranty, conveying the title to said real estate to said H. L. Kirtley and H. W. Herold, for which the said Special Commissioners shall be allowed the sum of Fifteen Dollars, to be taxed as a part of the costs of this suit.

And it is ordered that a writ of possession do issue for said real estate upon the motion of said H. L. Kirtley and H. W. Herold.

All of which is adjudged and decreed accordingly.

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[fol. 71] In Chancery

F. E. Cawley, Plaintiff,

vs.

W. B. Stephenson et al., Defendants

Whereas, J. M. Wolverton, W. G. Brown and T. W. Ayres were appointed Special Commissioners in the above styled case to make sale of certain real estate in the bill and proceedings mentioned, and

Whereas, said Special Commissioners did on the — day of ——, make sale of said real estate, at which sale, H. L. Kirtley and H. W. Herold became the purchasers thereof for the sum of $38,700.00, paying one-third cash and executing their two notes for the residue, each in the sum of $12,900.00, payable in one and two years after date, respectively, and

Whereas, said notes have been *lots* or mislaid and cannot now be found and said purchasers decline to make payment of the amounts called for by said notes as and when due unless said notes are delivered up to them, properly cancelled and marked "Paid" or unless they are directed by proper order of said Court, and

Whereas, said Special Commissioners have satisfied the Court that said notes have been lost or mislaid and cannot now be found and it appearing to the Court that the first of said notes is now past due, upon motion of the Plaintiff, by Counsel, and of said Special Commissioners, and argument of Plaintiff's Counsel it is hereby adjudged, ordered, and decreed that said Special Commissioners are hereby directed to give their joint receipt to said purchasers, describing the note or notes for which said money is received and the fact that said notes have been lost and cannot be found, for the sum called for in said notes when and as due, in lieu of said original notes and said purchasers are hereby directed to pay said notes and interest thereon when and as due to said Special Commissioners and to accept said receipt for the money so paid in lieu of said original notes.

[fol. 72] It is further adjudged, ordered and decreed that said notes as given by said purchasers are hereby cancelled, set aside and held for naught, when and so soon as said notes and each of them with the interest thereon in full is paid in conformity with the decree confirming the sale of this property, except and unless the said notes shall be found or otherwise come into the possession of said Special Commissioners, in which event, said notes shall be delivered to the purchasers when and as paid in lieu of the receipt directed to be given herein. And said Special Commissioners in the event that said notes or either of them shall hereafter be found, are hereby restrained from in any way negotiating them or disposing of them in any way except as required in this decree.

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[Title omitted]

[fol. 73] ORDER DISCHARGING BOND

It appearing to the court that the defendants in the above styled cause have failed to make an appearance herein within the time prescribed by law and make defense hereto, the bond required of the plaintiff by a former decree entered in this cause, with National Surety Company, as his surety, is hereby discharged and said surety company released from further liability thereon.

Chancery Order Book No. 10, page 232, May 19, 1923.

[fol. 74] In Chancery

F. E. Cawley, Plaintiff,

vs.

W. B. Stephenson, Defendant

Whereas, at the May, 1923, term of this court, there came into the hands of H. C. Hill, General Receiver of said court, the sum of $1,481.61, being the residue due the defendant in the above named cause, after the payment to the plaintiff by W. G. Brown, J. M. Wolverton and T. W. Ayres, Special Commissioners, of the amount adjudged to be due him, and of the costs of said suit.

And it appearing to the court that this matter is involved in a suit pending in the Federal District Court of the Southern District of West Virginia, at Charleston, which said court may call for said funds at any time; and it further appearing to the court that the said amount of $1,481.61, now in the hands of the aforesaid General Receiver, should be deposited at interest that it may enhance in amount.

Therefore, it is adjudged, ordered and decreed that the said H. C. Hill, General Receiver, as aforesaid, shall deposit the said fund of $1,481.61, on time deposit in the Nicholas County Bank of Summersville, West Virginia, at the usual rate of interest paid upon such deposits until the further order of this court.

Chancery Order Book No. 10, page 381, November term, 1923.

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[fol. 75] Statement re Exhibits

Exhibit No. 5 filed with plaintiff's bill in the Circuit Court of Nicholas County is the same as Exhibit No. 1 filed with plaintiff's bill in the United States District Court for the Southern District of West Virginia.

Exhibit No. 6 filed with plaintiff's bill in the Circuit Court of Nicholas County is the same as Exhibit No. 3 filed with plaintiff's bill in the United States District Court for the Southern District of West Virginia.

Exhibit No. 7 filed with plaintiff's bill in the Circuit Court of Nicholas County, West Virginia, is the same as Exhibit No. 2 filed with plaintiff's bill in the United States District Court for the Southern District of West Virginia.

Exhibit No. 8 filed with plaintiff's bill in the Circuit Court of Nicholas County, West Virginia, is the same as Exhibit No. 4 filed with plaintiffs' bill in the United States District Court for the Southern District of West Virginia.

Exhibit No. 9 filed with plaintiff's bill in the Circuit Court of Nicholas County, West Virginia, is the same as Exhibit No. 7 filed with plaintiffs' bill in the United States District Court for the Southern District of West Virginia.

Exhibit No. 10 filed with plaintiff's bill in the Circuit Court of Nicholas County, West Virginia, is the same as Exhibit No. 8 filed with plaintiffs' bill in the United States District Court for the Southern District of West Virginia.

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[fol. 76] Among the Records and Proceedings enrolled in the Court of Common pleas in and for the County of Clearfield, in the Commonwealth of Pennsylvania, to No. 38 May Term, 1911, is contained the following:

DOCKET ENTRIES

F. E. CAWLEY

vs.

GEORGE H. LUM, W. B. STEPHENSON

Copy of Continuance

Atty., $5.00; Sheriff, 12.50; Pro. Thompson, 8.00; Pro. Moore, 16.25.

Docket Entry

Summons in Assumpsit, damages not exceed $10,000.00. Returnable first Monday of March, Plaintiff's statement filed. Served the within writ and Plaintiff's copy statement as follows: On Feb. 4, 1911, George H. Lum by personally handing him a true and attested copy of this writ, and at the same time and place handing him the Pl'ffs' copy statement, and on Feb. 8, 1911, served the written summons and Pl'ff'- statement on Def't W. B. Stephenson by handing a true and attested copy of the within summons, and Pl'ff's copy statement to an adult member of his family at his dwelling house. So ans. E. H. Woolridge, Sheriff. Feb. 18, 1911, Affd. of defense filed. July 7, 1911, Prothonotary enters plea of non-assumpsit.

By Rule of Court

Sept. 11, 1911.—On trial list and continued at cost of defendant. [fol. 77] Dec. 1, 1911.—Petition for continuance filed. Now, Dec. 1, 1911, within application for continuance made and duly considered, thereupon cause continued at the expense of Defendant for the term, cause not to be again continued for the same reasons herein alleged. By the Court.

Dec. 1, 1911.—On trial list and continued on application of W. B. Stephenson and at his cost not to be again continued for the same reason. By the Court.

Feb. 1, 1912.—On trial list and continued. By the Court.

May 6, 1912.—On trial list and continued.

Jan. 27, 1913.—Continued on application of Plaintiff.

Sept. 13, 1915.—By paper filed Judgment is directed to be entered in favor of the Plaintiff and against the Defendants for the sum of Five Thousand Dollars with interest from Aug. 7, 1908. By the Court.

Debt, $5,000.00.
Interest from August 7, 1908.
Judgment: ——.

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[fol. 78] **Exhibit to Bill of Complaint**

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY

No. 38, May Term, 1911

F. E. CAWLEY

vs.

GEORGE H. LUM and W. B. STEPHENSON

PRÆCIPE FOR SUMMONS

Issue Summons in Assumpsit, Damages not exceeding $10,000.00. Returnable first Monday of March Next.

Roland D. Swoppe, Atty. for Plaintiff.

To Roll Thompson, Esq., Prothonotary.

(Endorsed:) Filed Feb. 4, 1911. Roll B. Thompson, Prothonotary.

[fol. 79] SUMMONS AND SHERIFF'S RETURN

CLEARFIELD COUNTY, ss:

The Commonwealth of Pennsylvania to the sheriff of said county, Greeting:

We command you, That you summon Geo. H. Lum and W. B. Stephenson, so that they be and appear before our Court of Common Pleas, to be holden at Clearfield, in and for said county, on the first Monday of March next, then to answer F. E. Cawley of a plea in Damages, $10,000.00. And have you then and there this writ.

Witness the Hon. Singleton Bell, President of our said Court, at Clearfield, Pa., the 4th day of Feb., an-o Domini one thousand nine hundred and 11.

Roll Thompson, Prothonotary.

Return of Service

Served the within writ and plaintiff's copy statements as follows: On Feb. 4, 1911, served the within summons on Defendant George H. Lum, by personally handing him a true and attested copy of this

writ and at the same time and place, handing him the plaintiff's copy statement, and on Feb. 8, 1911 served the within summons and plaintiff's statement on defendant W. B. Stephenson by handing a true and attested copy of the within summons, and plaintiff's copy statement, to an adult member of his family, at his dwelling house.

So answer-

E. H. Woolridge, Sheriff.

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[fol. 80] [Title omitted]

STATEMENT OF FACTS

The plaintiff, F. E. Cawley, claims of the defendants, Geo. H. Lum and W. B. Stephenson, the sum of Five Thousand (5,000.00) Dollars, with interest thereon from August 7th, 1908, at the rate of six per cent per annum, payable semi-annually, upon the cause of action whereof the following is a statement.

The defendants, George H. Lum and W. B. Stephenson, on the 7th day of February, 1908, at Little Falls, Minn., made their promissory note, whereof the following is a true and correct copy:

$5,000.00. Little Falls, Minn., Feb. 7th, 1908.

Aug. 7th, 1909, after date, we promise to pay the order of F. E. Cawley Five Thousand 00/100 Dollars at Little Falls, Minn., value received, with interest after date at the rate of 6 per cent per annum, payable semi-annually.

Geo. H. Lum. W. B. Stephenson.

No. —. Due —— —, ——.

(Endorsed on the back:) Interest hereon ($150.00) paid to Aug. 7th, 1908.

And having delivered the said promissory note to the plaintiff, the defendants became liable for the payment of the same according to the tenor and effect thereof.

Plaintiff received as collateral security for said note, a certificate for fifty (50) shares of the Capital Stock of the North Western Mill-
[fol. 81] ing Company of the par value of $100.00 per Share.

Plaintiff has received nothing whatever on said collateral and the same is still in possession of the plaintiff, and upon payment of the amount of said note, interest and costs of this action, plaintiff will deliver the said certificate of Stock to the said defendants.

Defendants have neglected and refused to pay the said note or pay part thereof, except the sum of one hundred and fifty (150) dollars, interest as credited thereon.

Wherefore the plaintiff brings this suit to recover from the defendants the sum of five thousand ($5,000.00) dollars, the face of said note together with interest thereon from August 7th, 1908, at the rate of six per cent per annum, payable semi-annually and costs.

Roland D. Swoop, Attorney for Plaintiff.

STATE OF MASSACHUSETTS,
County of Suffolk, ss:

F. E. Cawley, the plaintiff in the foregoing statement being duly sworn according to law doth depose and say that the facts set forth in the foregoing statement are true and correct as therein stated.

F. E. Cawley.

Sworn and subscribed before me this 31st day of January, A. D. 1911. Wm. Lippman, Notary Public. Commission expires October 20, 1916.

(Endorsed:) Filed Feb. 4, 1911. Roll B. Thompson, Prothonotary.

---

[fol. 82] [Title omitted]

AFFIDAVIT OF ROLL B. THOMPSON

CLEARFIELD COUNTY, ss:

Personally appeared before me, Roll B. Thompson, Prothonotary, W. B. Stephenson, one of the above named defendants, who being duly sworn according to law says that he has a full and just defense to the whole of plaintiff's claim, the nature and character of which is as follows:

First. That there was no consideration given for the note of $5,000 on which the plaintiff now asks to recover from the said W. B. Stephenson $5,000 with interest from August 7th, 1908.

Second. That when this note was given the plaintiff held and owned the certificate for 50 shares of stock of the North-Western Milling Company of the par value of $100 per share, referred to in plaintiff's statement and which he now alleges to hold as collateral security for the payment of said note and the plaintiff then and there attempted to make a technical transfer of said stock certificate as consideration for this note but the plaintiff in fact still held and now holds this stock certificate and W. B. Stephenson was never the owner of this stock certificate or had possession of it.

Third. This certificate of stock had no value at the time the note was given or at any time since. The Northwestern Milling Company was then insolvent and was within a few months thereafter adjudged bankrupt and this certificate of stock was worthless and is worthless today, all of which was then and is now known to plaintiff.

[fol. 83] Fourth. At the time this note was given George H. Lum, one of the defendants, was President of the Northwestern Milling Company and had entire control of the mill, plant, equipment, books, accounts and papers of this Company and so manipulated the books and accounts and papers of this company as to conceal from and deceive the said W. B. Stephenson as to the actual condition of the company as to its insolvency and the worthless value of its stock.

Fifth. That at the time this note was given and during most of the period since there has been a close allied business relation between George H. Lum and the Plaintiff so that the plaintiff was furnished with information and had knowledge as to the actual condition of this Company both as to its insolvency and the worthless value of this stock, and knowing the worthless value of this stock, he, the plaintiff, and George H. Lum entered into a scheme to cheat and defraud W. B. Stephenson whereby they tricked him into giving his note of $5,000 as well as other notes and attempted to transfer to him as consideration therefor this worthless stock.

Sixth. That the plaintiff subsequent to the giving of this note was a creditor of the Northwestern Milling Company and George H. Lum was a debtor and some time in the year 1909 the said F. E. Cawley along with other creditors of the Northwestern Milling Company accepted from George H. Lum certain property owned by George H. Lum as consideration for releasing him from further liability.

Seventh. That the plaintiff accepted this property of George H. Lum and released him without making any effort or attempt to collect from him any amount on this $5,000 note or the other notes which he now holds.

All of which defendant believes and expects to be able to prove on the trial of the case.

W. B. Stephenson.

Sworn and subscribed to this eighteenth day of February A. D. 1911. Roll B. Thompson, Pro.

[fol. 84] (Endorsed:) Filed Sept. 13, 1915. John H. Moore, Prothonotary.

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[fol. 85] PETITION OF W. B. STEPHENSON

[Title omitted]

To the Honorable Allison O. Smith, President Judge of said court:

The petition of W. B. Stephenson, one of the above named defendants respectfully represents:

1. That the above stated case is on the list for trial for the week beginning December 4, 1911.

2. That the said defendant is not prepared to go to trial and is wholly unable to present a full and adequate defense in this case at this time for the following reasons:

(a) The defense upon which defendant relies consists largely of facts contained in books and papers belonging to the Northwestern Milling Company of Little Falls, Minn., which books and papers will require a careful and th-rough examination in advance of the

trial and said books and papers must be presented at the trial of this case, and these books and papers are now in the custody of the Northwestern Milling Company of Little Falls, Minn.

(b) The particular person who had charge and custody of these books has either since died or is in parts unknown and it will be necessary to either produce such person or to make proof of his handwriting.

(c) The further testimony upon which the defendant relies is contained in the bankruptcy proceeding against George H. Lum Bankrupt in the United States District Court for the State of Minnesota and an examination of the proceeding will be necessary in advance of the trial and an exemplified copy of that proceeding necessary at the trial.

(d) The further testimony upon which defendant relies in his defense is contained in the bankruptcy proceeding against the North- [fol. 86] western Milling Company bankrupt in the United States District Court for the State of Minnesota and an examination in detail will be necessary in advance of the trial and an exemplified copy of said proceedings will be necessary at the trial.

All of these facts are material and necessary to the defense of this case and because of the amount that is here involved and of the multiplicity of facts and of the time and expense required in the preparation of a case of this character defendants has been unable to gather together and prepare his defense for the trial of the case at this term; and for the further reason that the witnesses who are necessary to a defense of this case are without the jurisdiction of the Court and have refused to attend the trial at this term. The witnesses upon whom the defendant relies are John W. Stephenson, H. C. Meining of Little Falls, Minn., and —— Hanks, address unknown; and for the further reason that it is impracticable and out of reason for the defendant to take depositions in advance of the trial of this case without an examination of these books and papers and records in advance of such depositions.

He, therefore, prays that the honorable Court for the reasons herein stated will grant a continuance of this case from this term of Court until the next February Term of Court at which time he expect- to be able to present a full and complete defense to this case.

W. B. Stephenson.

STATE OF PENNSYLVANIA,
County of Clearfield, ss:

Personally appeared before me W. B. Stephenson who being duly affirmed according to law says that the facts set forth in the foregoing petition are true and correct in so far as he knows and in so far as he has been advised by counsel.

Witness my hand and official seal this 29 day of November A. D. 1911.

[fol. 87] Roll B. Thompson, Prothonotary.

(Endorsed:) Filed Dec. 1, 1911. Roll B. Thompson, Prothonotary.

[fol. 88] AFFIDAVIT OF W. B. STEPHENSON

[Title omitted]

STATE OF PENNSYLVANIA,
County of Clearfield, ss:

Personally appeared before me W. B. Stephenson, who being duly sworn according to law says that he is one of the defendants in the above stated case and that John W. Stephenson, a material witness, who has personal charge and custody of books and papers that are material to the defense of this case, is in the State of Minnesota and that the books and papers necessary to the defense are in the State of Minnesota; that the said John W. Stephenson being without the jurisdiction of the court and not subject to a subpœna cannot be brought before this court; and that the said John W. Stephenson is unable to attend the trial of this case at this September Court because any absence from his business at this time would mean serious loss to him, in his business.

W. B. Stephenson.

Sworn and subscribed to before me this 13th day of September A. D. 1911. Andrew McQuown, N. P. My commission expires Feb. 21st, 1915.

[fol. 89] COPY OF JUDGMENT DOCKET ENTRY

| Defendants | Plaintiffs | Docket | No. | Term | Year | Date of lien |
|---|---|---|---|---|---|---|
| Lum, Geo. H. et al. | F. E. Cawley..... | 89 | 38 | May | 1911 | Sept. 13, 1915 |
| Stephenson, W. B. et al. | F. E. Cawley..... | 89 | 38 | May | 1911 | Sept. 13, 1915 |

| Defendants | Plaintiffs | Nature of lien | Amount | Commenc't of int. |
|---|---|---|---|---|
| Lum, Geo. H. et al. | F. E. Cawley..... | Judgment | $5,000.00 | Aug. 7, 1915 |
| Stephenson, W. B. et al. | F. E. Cawley..... | Judgment | $5,000.00 | Aug. 7, 1915 |

[fol. 90] CLERK'S CERTIFICATE

COMMONWEALTH OF PENNSYLVANIA,
County of Clearfield, ss:

I, Geo. W. Ralston, Prothonotary of the Court of Common Pleas in and for said County do, hereby certify that the foregoing is a full, true and correct copy of the whole record of the case therein stated, wherein F. E. Cawley, — Plaintiff and George H. Lum and W. B. Stephenson — Defendant-, so full and entire as the same remains of record before the said Court, at No. —, May Term, A. D. 1911.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court this 26 day of January, 1920.

Geo. W. Ralston, Prothonotary.

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JUDGE'S CERTIFICATE TO CLERK

I, Singleton Bell, President Judge of the Fort*h*-sixth Judicial District, composed of the Courts of Oyer and Terminer, Quarter Sessions and General Jail Delivery, Orphans' Court and Court of Common Pleas do certify that —— ——, by whom the annexed record, certificate and attestations where made and given, and who, in his own proper handwriting, thereunto subscribed his name and affixed the seal of the Court of Common Pleas of said county, was at the time of so doing and now is Prothonotary in and for said county of Clearfield, the Commonwealth of Pennsylvania, duly commissioned and qualified; to all of whose acts as such, full faith and credit are and ought to be given as well in Courts of Judicature as elsewhere, and that the said record, certificate and attestation are in due form of law and made by the proper officer.

Singleton Bell, President Judge.

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CLERK'S CERTIFICATE TO JUDGE

COMMONWEALTH OF PENNSYLVANIA,
County of Clearfield, ss:

I, Geo. W. Ralston, Prothonotary of the Court of Common Pleas in and for said county, do certify that the Honorable Singleton Bell, [fol. 91] by whom the foregoing attestation was made and who thereunto subscribed his name, was at the time of making thereof and still is President Judge of the Court of Oyer and Terminer, Quarter Sessions and General Jail Delivery, Orphans' Court and Court of Common Pleas, in and for said County, duly commissioned and qualified; to all whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 26 day of January, A. D. 1920.

Geo. W. Ralston, Prothonotary.

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[fol. 92] Among the records and Proceedings enrolled in the Court of Common Pleas in and for the County of Clearfield, in the Commonwealth of Pennsylvania, to No. 29 May, Term, 1914, is contained the following:

EXHIBIT TO BILL OF COMPLAINT

C. J. CAWLEY

vs.

GEORGE H. LUM, W. B. STEPHENSON

Copy of Continuance

Atty., $5.00; Pro. Moore, 15.25.

Docket Entry-

Summons in Assumpsit, damages not exceeding $10,000, Returnable first Monday of March next. The Plaintiff's statement filed. Now, February 4, 1914, we hereby accept service of the within summons and waive service thereof by the sheriff and also accept service of copy of Plaintiff's statement. Geo. H. Lum. Murray & O'Laughlin, Attys. for W. B. Stephenson.

February 25, 1914.—Affidavit of defense filed.

March 30, 1914.—Prothonotary enters plea of non-assumpsit as per rule of court.

May 4, 1914.—Continued by consent.

February 2, 1915.—Continued.

May 11th, 1915.—On trial list and continued.

September 13, 1915.—By paper filed, judgment is directed to be entered in favor of the Plaintiff and against the Defendants for the sum of forty-five hundred dollars with interest from August 7, 1908. By the Court.

Debt, $4,500.00.

[fol. 93] Interest from August 7, 1908.

Judgment: ——.

January 19, 1920.—By papers filed the above judgment is assigned, transferred and set over to F. E. Cawley Debt, interest without recourse.

Attest: Geo. W. Ralston, Prothonotary.

SUMMONS

COMMONWEALTH OF PENNSYLVANIA,
County of Clearfield:

The Commonwealth of Pennsylvania to the sheriff of said county, Greeting:

We command you that you summon Geo. H. Lum and W. B. Stephenson so that they be and appear before our Court of Common Pleas, to be holden at Clearfield, in and for said county, on the first Monday of March next, then to answer C. J. Cawley of a plea in assumpsit, Damages, not exceeding $10,000.00, and have you then and there this writ.

Witness the Hon. Singleton Bell, President of our said Court, at Clearfield, Pa., the 4th day of February, Anno Domini one thousand nine hundred and 14.

John H. Moore, Prothonotary.

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IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNA.

No. 29, May Term, 1914

C. J. CAWLEY

vs.

GEO. H. LUM and W. B. STEPHENSON

[fol. 94] Issue Summons in Assumpsit, Damages not exceeding $10,000.00. Returnable first Monday of March next.

—— ——, Attorney for Plaintiff.

To John H. Moore, Esq., Prothonotary.

Return on Service of Summons

Now, February 4, 1914, we hereby accept service of the within summons and waive service thereof by the Sheriff and also accept service of copy of Plaintiff's statement.

Geo. H. Lum, Murray O'Laughlin, Attys. for W. B. Stephenson.

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[fol. 95] STATEMENT OF FACTS

[Title omitted]

The Plaintiff, C. J. Cawley, claims of the Defendants, Geo. H. Lum and W. B. Stephenson, the sum of five thousand ($5,000.00) dollars, with interest thereon from August 7th, 1908, at the rate of six per cent per annum, payable semi-annually, less credit of five

hundred ($500.00) dollars, paid on principal September 4, 1908, upon the cause of action whereof the following is a statement.

The defendants, Geo. H. Lum and W. B. Stephenson, on the 7th day of February, 1908, at Little Falls, Minn., made their promissory note, whereof the following is a true and correct copy:

$5,000.00. Little Falls, Minn., Feb. 7, 1908.

Aug. 7th, 1908, after date, we promise to pay to the order of F. E. Cawley five thousand dollars at Little Falls, Minn., value received, with interest after date at the rate of 6 per cent per annum, payable semi-annually.

No. —. Due —— —, ——.

Geo. H. Lum. W. B. Stephenson.

(Endorsed on back:) Interest hereon, $150.00, paid to Aug. 7th, 1908. Sept. 4th, 1908, paid on principal $500.00. Pay C. J. Cawley [fol. 96] or order. F. E. Cawley.

That the said written instrument was a negotiable instrument and was delivered by the Defendants to F. E. Cawley for the purpose of giving effect to the said instrument and was negotiated by said F. E. Cawley by endorsement and delivery to the Plaintiff herein named, Plaintiff received with said Note as collateral security therefore a certificate for fifty Shares of the Capital Stock of the Northwestern Milling Company of the par value of one hundred ($100.00) dollars per share. Neither the Payee of said Note, F. E. Cawley or the Plaintiff have received anything whatever on account of said collateral and the same is still in possession of the Plaintiff and upon payment of the balance of said Note, with interest and costs of this suit, Plaintiff will deliver the said Certificate of Stock to the said Defendants. Defendants upon demand, being made for payment of this Note according to the tenor and effect thereof, have neglected to pay the same or any part thereof, except the payments as credited thereon.

Wherefore, the plaintiff brings this suit to recover from the Defendants the sum of five thousand ($5,000.00) dollars, together with interest thereon from August 7th, 1908, at the rate of six per cent per annum, payable semi-annually, and costs, less credits as endorsed on said Note.

—— ——, Attorney for Plaintiff.

State of Minnesota,
County of Pipestone, ss:

C. J. Cawley, the plaintiff in the foregoing action being duly sworn, according to law, doth depose and say that the facts set forth in the foregoing statement are true and correct.

C. J. Cawley.

Sworn and subscribed before me this 2nd day of Feb., A. D. [fol. 97] 1914. W. T. Morgan, Notary Public, Pipestone County. My commission expires Jan. 16, 1916.

(Endorsed:) Filed Feb. 5, 1914. John H. Moore, Prothonotary.

[fol. 98] AFFIDAVIT OF W. B. STEPHENSON

[Title omitted]

Personally appeared before me, John H. Moore, Prothonotary, W. B. Stephenson, one of the above named defendants, who being duly sworn according to law says that he has a full and just defense to the whole of Plaintiff's claim, the nature and character of which is as follows:

First. That plaintiff is not the owner or holder for value or consideration of the note of $5,000.00 on which this action is brought but is the mere custodian for the purpose of this action.

Second. That there was never an assignment or transfer of said note but a mere delivery without value and that delivery was made long after the maturity of said note and after the note had lost its negotiability.

Third. That F. E. Cawley, the Payee, actual holder and owner of said note gave no value or consideration for said note.

Fourth. That at the time this note was given the said F. E. Cawley held and owned large shares of stock of the Northwestern Milling Company at Little Falls, Minnesota, of which he purported or attempted to assign to said W. B. Stephenson but of which he is still the owner and holder.

Fifth. That at the time this note was given said shares of stock of the Northwestern Milling Company were worthless and of no value and the Northwestern Milling Company was insolvent and within a few months thereafter was adjudged bankrupt.

Sixth. That at the time this note was given the said F. E. Cawley well knew of the worthless value of said stock and of the insolvency of [fol. 99] the said Northwestern Milling Company.

Seventh. That at the time this note was given George H. Lum, one of the defendants, was President of the Northwestern Milling Company and had entire control of its management and operation.

Eighth. That at the time this note was given and during most of the period since there has been a close allied business relation between George H. Lum and F. E. Cawley.

Ninth. That at the time this note was given both George H. Lum and F. E. Cawley well knew of the insolvent and bankrupt condition of the Northwestern Milling Company.

Tenth. That W. B. Stephenson never knew of the insolvency of the Northwestern Milling Company until after this note was given and at or about the time the Northwestern Milling Company was adjudged bankrupt.

Eleventh. That F. E. Cawley and George H. Lum together entered into a scheme to cheat and defraud W. B. Stephenson by the method herein set out.

Twelfth. That F. E. Cawley and George H. Lum subsequent to the giving of this note agreed with each other to release and discharge George H. Lum from liability on this note and F. E. Cawley has accepted and received certain property from George H. Lum in consideration thereof.

All of which defendant, W. B. Stephenson, believes and expects to be able to prove on the trial of this case.

W. B. Stephenson.

Sworn and subscribed to this 25th day of February, A. D. 1914. John H. Moore, Pro.

(Endorsed:) Filed Feb. 25, 1914. John H. Moore, Prothonotary.

[fol. 100] [Title omitted]

STIPULATION AND ENTRY OF JUDGMENT

We, the subscribers hereto, the defendants above named, agree to a settlement of the said case that there be judgment entered against us for the sum of Forty-Five Hundred Dollars with interest thereon from August 7th, 1908, and the record costs.

George H. Lum. (Seal.) W. B. Stephenson. (Seal.)

Witness: Roland Swoope, J. P. O'Laughlin.

Now this 13th day of September A. D. 1915 in accordance with the said direction of the said defendants judgment is hereby entered against the said defendants for the said amount and for the said costs with interest thereon.

By the Court. Singleton Bell, P. J.

Now this 10th day of May, A. D. 1915, we, the said plaintiffs and the said defendants are agreed that upon the payment by the said defendants, or either of them, of the said judgment, debt, interest and costs, the plaintiff shall deliver to the defendant so paying said sum, the collateral security which is now held by the plaintiff, to wit: Fifty shares of the capital stock of the Northwestern Milling Company, a Minnesota Corporation.

Roland Swoope, Atty. for Plf. (Seal.) J. P. O'Laughlin, Atty. for Def. (Seal.)

Witness: —— ——.
Clearfield, Penna., May 10, 1915.

[fol. 101] (Endorsed:) Filed Sept. 13, 1915. John H. Moore, Prothonotary.

[fol. 102] ASSIGNMENT C. J. CAWLEY TO F. E. CAWLEY

No. 29, May Term, 1914

[Title omitted]

| | |
|---|---|
| Debt | $4,500.00 |
| Int. from Aug. 7th, 1908 | ..... |
| Attorney and Tax | 5.00 |
| Pro. Moore | 15.25 |

Entered 13th of Sept. 1915.

Now, November —, 1919, for value received, I hereby assign, transfer and set over to F. E. Cawley the above stated judgment, debt, interest and costs.

C. J. Cawley.

Witness-: Horace B. Lewis, J. E. Hopper.

[fol. 103] To Assigned to Judgment

Assignee, F. E. Cawley; assignor, C. J. Cawley; defendant, Geo. H. Lum; No, date, and year, 29 May T., 1914; amount, $4,500.00; date Jan. 19, 1920.

[fol. 104] COPY OF JUDGMENT DOCKET ENTRY

| Defendants | Plaintiffs | Docket | No. | Term | Year | Date of lien |
|---|---|---|---|---|---|---|
| Lum, Geo. H. et al. | C. J. Cawley..... | 94 | 29 | May | 1914 | Sept. 13, 1915 |
| Stephenson, W. B. et al. | C. J. Cawley..... | 94 | 29 | May | 1914 | Sept. 13, 1915 |

| Defendants | Plaintiffs | Nature of lien | Amount | Commenc't of int. |
|---|---|---|---|---|
| Lum, Geo. H. et al. | C. J. Cawley..... | Judgment | $4,500.00 | Aug. 7th, 1915 |
| Stephenson, W. B. et al. | C. J. Cawley..... | Judgment | $4,500.00 | Aug. 7th, 1915 |

[fol. 105] CLERK'S CERTIFICATE

COMMONWEALTH OF PENNSYLVANIA,
County of Clearfield, ss:

I, Geo. W. Ralston, Prothonotary of the Court of Common Pleas in and for said County, do hereby certify that the foregoing is a full, true and correct copy of the whole record of the case therein stated, wherein C. J. Cawley — plaintiff and Geo. H. Lum and W. B. Stephenson — defendant-, so full and entire as the same remains of record before the said Court, at No. —, May Term, A. D. 1914.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 26 day of January, 1920.

Geo. W. Ralston, Prothonotary.

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JUDGE'S CERTIFICATE TO CLERK

I, Singleton Bell, President Judge of the Forth-sixth Judicial District, composed of the Courts of Oyer and Terminer, Quarter Sessions and General Jail Delivery, Orphan's Court and Court of Common Pleas, do certify that Geo. W. Ralston by whom the annexed record, certificate and attestation were made and given, and who, in his own proper handwriting, thereunto subscribed his name and affixed the seal of the Court of Common Pleas of said County, was at the time of so doing and now is Prothonotary in and for said county of Clearfield, Commonwealth of Pennsylvania, duly commissioned and qualified; to all of whose acts as such, full faith and credit are an- ought to be given, as well in Courts of Judicature as elsewhere, and that the said record, certificate and attestation are in due form of law and made by the proper officer.

Singleton Bell, President Judge.

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[fol. 106] CLERK'S CERTIFICATE TO JUDGE

COMMONWEALTH OF PENNSYLVANIA,
County of Clearfield, ss:

I, Geo. W. Ralston, Prothonotary of the Court of Common Pleas in and for said County, do certify that the Honorable Singleton Bell, by whom the foregoing attestation was made and who has thereunto subscribed his name, was at the time of making thereof and still is President Judge of the Court of Oyer, and Terminer, Quarter Sessions and General Jail Delivery, Orphans' Court and Court of Common Pleas, in and for said County, duly commissioned and qualified; to all whose acts, as such, full faith and credit are an- ought to be given, as well in Courts of Judicature as elsewhere.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 26 day of January, A. D., 1920.

Geo. W. Ralston, Prothonotary.

[fol. 107] Among the records and proceedings enrolled in the Court of Common Please in and for the County of Clearfield, in the Commonwealth of Pennsylvania, to No. 31 May Term, 1914, is contained the following:

EXHIBIT TO BILL OF COMPLAINT

SARAH H. CAWLEY

vs.

GEORGE H. LUM and W. B. STEPHENSON

Docket Entry-

Atty., $5.00; Pro. Moore, 15.25.

Summons in Assumpsit, damages not excee-ing $10.00. Returnable first Monday of March next. Plaintiffs' Statement filed.

Now, February 4, 1914, we hereby accept service of the within summons and waive service thereof by the sheriff and also accept service of copy of Plaintiffs' Statement. Geo. H. Lum, Murray & O'Laughlin, Attys. for W. B. Stephenson.

February 25, 1914.—Aff. of defense filed.

March 30, 1914.—Prothonotary enters plea of non-assumpsit as per rules of court.

May 4, 1914.—Continued by consent February 2, 1915. Continued May 11, 1915. On Trial list and continued.

Sept. 13, 1915.—By paper filed judgment is entered in favor of the Plaintiff and against the Defendants for the sum of Five Thousand Dollars with interest from August 7, 1908. By the Court.

Debt, $5,000.00.

Interest from August 7, 1908.

Judgment: ——.

Jan. 19th, 1920.—By paper filed the above judgment is assigned, transferred and set over to F. E. Cawley, debt, interest and cost without recourse.

Attest: Geo. W. Ralston, Prothonotary.

In Court of Common Pleas of Clearfield County, Penna.

No. 31, May Term, 1914

SARAH H. CAWLEY

vs.

GEO. H. LUM and W. B. STEPHENSON

[fol. 108] PRÆCIPE FOR SUMMONS

Issue summons in Assumpsit. Damages not exceeding $10,000.00. Returnable first Monday of March next.

Roland D. Swoope, Attorney for Plaintiff.

To John H. Moore, Esq., Prothonotary.

(Endorsed:) Filed Feb. 4, 1914. John H. Moore, Prothonotary.

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SUMMONS

CLEARFIELD COUNTY, ss:

The Commonwealth of Pennsylvania to the sheriff of said county, Greeting:

We command you that you summon Geo. H. Lum and W. B. Stephenson so that they be and appear before our Court of Common Pleas, to be holden at Clearfield, in and for said county, on the first Monday of March, next, then to answer Sarah H. Cawley of a plea in Assumpsit Damages, not exceeding $10,000.00. And have you then and there this writ.

Witness the Hon. Singleton Bell, President of our said Court, at Clearfield, Pa., the 4th day of February, Anno Domini one thousand nine hundred and 14.

John H. Moore, Prothonotary.

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[fol. 109] STATEMENT OF FACTS

[Title omitted]

The Plaintiff, Sarah H. Cawley, claims of the Defendants, Geo. H. Lum and W. B. Stephenson, the sum of five thousand ($5,000.00) dollars, with interest thereon from August 7th, 1908, at the rate of six per cent per annum, payable semiannually, upon the cause of action, whereof the following is a statement.

The Defendants, Geo. H. Lum and W. B. Stephenson, on the 7th day of February, 1908, at Little Falls, Minn., made their promissory note, whereof the following is a true and correct copy:

$5,000.00. Little Falls, Minn., Feb. 7th, 1908.

Three years after date we promise to pay to the order of F. E. Cawley five thousand dollars at Little Falls, Minn., value received, with interest after date *that* the rate of 6 per cent per annum, payable semiannually.

No. —. Due —— —, ——.

Geo. H. Lum, W. B. Stephenson.

(Endorsed on back:) Interest hereon paid to Feb. 28th, '08. Interest hereon ($132.57) paid, being interest to Aug. 7th, 1908. Pay Sarah H. Cawley or order. F. E. Cawley.

That the said written instrument was a negotiable instrument and was delivered by the Defendants to F. E. Cawley for the purpose of giving effect to the said instrument and was negotiated by said F. E. Cawley by endorsement and delivery to the Plaintiff herein named, Plaintiff received with said Note as collateral security therefore a certificate for fifty Shares of the Capital Stock of the North Western Milling Company of the par value of one hundred ($100.00) dollars per share. Neither the Payee of said Note, F. E. Cawley or the Plaintiff have received anything whatever on account of said collateral and [fol. 110] the same is still in possession of the plaintiff and upon payment of the amount of said Note, with interest and costs of this suit, Plaintiff will deliver the said Certificate of Stock to the said Defendants. Defendants upon demand, being made for payment of this Note according to the tenor and effect thereof, have neglected to pay the same or any part thereof, except the interest as credited thereon.

Wherefore the Plaintiff brings this suit to recover from the Defendants the sum of five thousand ($5,000.00) dollars, together with interest thereon from August 7th, 1908, at the rate of six per cent per annum, payable semi-annually, and costs.

Roland Swoope, Attorney for Plaintiff.

State of Massachusetts,
County of Middlesex, ss:

Sarah H. Cawley, the Plaintiff in the foregoing action being duly sworn, according to law, doth depose and say that the facts as set forth in the foregoing statement are true and correct.

Sarah H. Cawley.

Sworn and subscribed before me this 29th day of January, A. D. 1914. George H. Carrick, Notary Public. My commission expires Dec. 21, 1917.

(Endorsed:) Filed Feb. 4, 1914. John H. Moore, Prothonotary.

[fol. 111] [Title omitted]

AFFIDAVIT OF W. B. STEPHENSON

CLEARFIELD COUNTY, ss:

Personally appeared before me, John H. Moore, Prothonotary, W. B. Stephenson, one of the above named defendants, who being duly sworn according to law says that he has a full and just defense to the whole of Plaintiff's claim, the nature and character of which is as follows:

First. That plaintiff is not the owner or holder for value or consideration of the note of $5,000.00 on which this action is brought but is the mere custodian for the purposes of this action.

Second. That there was never an assignment or transfer of said note but a mere delivery without value and that delivery was made long after the maturity of said note and after the note had lost its negotiability.

Third. That F. E. Cawley, the Payee, actual holder and owner of said note gave no value or consideration for said note.

Fourth. That at the time this note was given the said F. E. Cawley held and owned large shares of stock of the Northwestern Milling Company at Little Falls, Minnesota, of which he purported or attempted to assign to said W. B. Stephenson but of which he is still owner and holder.

Fifth. That at the time this note was given said shares of stock of the Northwestern Milling Company were worthless and of no value and the Northwestern Milling Company was insolvent and within a few months thereafter was adjudged bankrupt.

Sixth. That at the time this note was given the said F. W. Cawley well knew of the worthless value of said stock and of the insol-
[fol. 112] vency of the said Northwestern Milling Company.

Seventh. That at the time this note was given George H. Lum, one of the defendants, was President of the Northwestern Milling Company and had entire control of its management and operation.

Eighth. That at the time this note was given and during Most of the period since there has been a close allied busines relation between George H. Lum and F. E. Cawley.

Ninth. That at the time this note was given both George H. Lum and F. E. Cawley well knew of the insolvent and bankrupt condition of the Northwestern Milling Company.

Tenth. That W. B. Stephenson never knew of the insolvency of the Northwestern Milling Company until after this note was given and at or about the time the Northwestern Milling Company was adjudged bankrupt.

Eleventh. That F. E. Cawley and George H. Lum together entered into a scheme to cheat and defraud W. B. Stephenson by the method herein set out.

Twelfth. That F. E. Cawley and George H. Lum subsequent to the giving of this note agreed with each other to release and discharge George H. Lum from liability on this note and F. E. Cawley has accepted and received certain property from George H. Lum in consideration thereof.

All of which defendant, W. B. Stephenson, believes and expects to be able to prove on the trial of this case.

W. B. Stephenson.

Sworn and subscribed to this 25th day of February, A. D. 1914. John H. Moore, Pro.

(Endorsed:) Filed Feb. 25, 1914. John H. Moore, Prothonotary.

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[fol. 113] [Title omitted]

STIPULATION AND ENTRY OF JUDGMENT

We the subscribers hereto, the defendants above named, agree as a settlement of the said case that there be judgment entered against us for the sum of Five Thousand Dollars with interest thereon from August 7th, 1908, and the record costs.

Geo. H. Lum. (Seal.) W. B. Stephenson. (Seal.)

Witness-: Roland D. Swoope, J. P. O'Laughlin.

Now this 13th day of September A. D. 1915 in accordance with the said direction of the said defendants judgment is hereby entered against the said defendants for the said amount and for the said costs with interest thereon.

By the Court. Singleton Bell, P. J.

Now this 10th day of May A. D. 1915 we the said plaintiff and the said defendants are agreed that upon the payment by the said defendants, or either of them, of the said judgment, debt, interest and costs, the plaintiff shall deliver to the defendants so paying said sum the colateral security which is now held by the plaintiff to wit: Fifty shares of the capital stock of the Northwestern Milling Company, a Minnesota corporation.

Roland Swoope. (Seal.) J. P. O'Laughlin. (Seal.)

Clearfield, Penna., May 10th, 1915.

[fol. 114] No. 31, May Term, 1914

[Title omitted]

| | |
|---|---|
| Debt | $5,000.00 |
| Int. from Aug. 7th, 1908 | ..... |
| Atty. and Tax | 5.00 |
| Pro. Moore | 15.25 |

Entered 13th of September, 1915.

ASSIGNMENT, SARAH H. CAWLEY TO F. E. CAWLEY

Now, November 29th, 1919, for value received, I hereby assign, transfer and set over to F. E. Cawley the above stated judgment, debt, interest and costs.

Sarah H. Cawley.

Witness: Lila Lo Cascio.

[fol. 115] Index to Assigned to Judgment

Assignee, Cawley, F. E.; assignor, Sarah H. Cawley; defendant, Geo. H. Lum et al.; No., term, and year, 31, May, 1914; amount, $5,000.00; date, Jan. 19, 1920.

[fol. 116] COPY OF JUDGMENT DOCKET ENTRY

| Defendants | Plaintiffs | Docket | No. | Term | Year | Date of lien |
|---|---|---|---|---|---|---|
| Lum, Geo. H. et al. | Sarah H. Cawley. . . | 94 | 31 | May | 1914 | Sept. 13, 1915 |
| Stephenson, W. B. et al. | Sarah H. Cawley. . . | 94 | 31 | May | 1914 | Sept. 13, 1915 |

| Defendants | Plaintiffs | Nature of lien | Amount | Commenc't of int. |
|---|---|---|---|---|
| Lum, Geo. H. et al. | Sarah H. Cawley. . . | Judgment | $5,000.00 | Aug. 7, 1908 |
| Stephenson, W. B. et al. | Sarah H. Cawley. . . | Judgment | $5,000.00 | Aug. 7, 1908 |

[fol. 117] CLERK'S CERTIFICATE

COMMONWEALTH OF PENNSYLVANIA,
County of Clearfield, ss:

I, Geo. W. Ralston, Prothonotary of the Court of Common Pleas in and for said County, do hereby certify that the foregoing is a full, true and correct copy of the whole record of the case therein stated, wherein Sarah H. Cawley — plaintiff, and Geo. H. Lum and W. B. Stephenson — Defendant-, so full and entire as the same remains of record before the said Court, at No. —, May Term, A. D. 1914.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 26 day of January, 1920.

Geo. W. Ralston, Prothonotary.

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JUDGE'S CERTIFICATE TO CLERK

I, Singleton Bell, President Judge of the Forty-sixth Judicial District, composed of the Courts of Oyer and Terminer, Quarter Sessions and General Jail Delivery, Orphan's Court and Court of Common Pleas, do certify that Geo. W. Ralston by whom the annexed record, certificate and attestation were made and given, and who, in his own proper handwriting, thereunto subscribed his name and affixed the seal of the Court of Common Pleas of said County, was at the time of so doing and now is Prothonotary in and for said county of Clearfield, the Commonwealth of Pennsylvania, duly commissioned and qualified; to all of whose acts as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere, and that the said record, certificate and attestation are in due form of law and made by the proper officer.

Singleton Bell, President Judge.

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[fol. 118] CLERK'S CERTIFICATE TO JUDGE

COMMONWEALTH OF PENNSYLVANIA,
County of Clearfield, ss:

I, Geo. W. Ralston, Prothonotary of the Court of Common Pleas in and for said county, do certify that the Honorable Singleton Bell, by whom the foregoing attestation was made and who has thereunto subscribed his name, was at the time of making thereof and still is President Judge of the Court of Oyer, and Terminer, Quarter Sessions and General Jail Delivery, Orphans' Court and Court of Common Pleas, in and for said county, duly commissioned and qualified; to all whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 26 day of January, A. D., 1920.

Geo. W. Ralston, Prothonotary.

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[fol. 119] Among the records and proceeding enrolled in the Court of Common Pleas in and for the County of Clearfield, in the Commonwealth of Pennsylvania, to No. 30, May Term, 1914, is contained the following:

**Exhibit to Bill of Complaint**

Copy of Continuance

Docket Entry

Frank Stanton Cawley

vs.

George H. Lum and W. B. Stephenson

Atty., $5.00; Pro. Moore, 15.25.

Summons in assumpsit, damages not exceeding $10,000. Returnable first Monday of March next.

Plaintiff's statement filed.

Now, February 4, 1914, we hereby accept service of the within summons and waive service thereof by the sheriff and also accept service of copy of Plaintiff's statement. Geo. H. Lum. Murray & O'Laughlin, Attys. for W. B. Stephenson.

February 25, 1914.—Affidavit of defense filed.

March 30, 1914.—Prothonotary enters plea of non-assumpsit as per rule of court.

May 4, 1914.—Continued by agreement.

February 2, 1915.—Continued.

May 11, 1915.—On trial list and continued.

Sept. 13, 1915.—By paper filed, judgment is directed to be entered in favor of the Plaintiff and against the Defendants for the sum of Five Thousand Dollars with interest from August 7, 1908. By the Court.

Debt, $5,000.00.

Interest Aug. 7, 1908.

Filed and entered Sept. 13, 1915.

[fol. 120] Judgment: ——.

Jan. 19, 1920.—By paper filed the above judgment is assigned, transferred and set over to F. E. Cawley, debt, interest and cost, without recourse.

Attest: Geo. W. Ralston, Prothonotary.

IN COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNA.

No. —, May Term, 1914

FRANK STANTON CAWLEY

vs.

GEO. H. LUM and W. B. STEPHENSON

PRÆCIPE FOR SUMMONS

Issue summons in assumpsit, damages not exceeding $10,000.00. Returnable first Monday of March next.

Roland Swoope, Attorney for Plaintiff.

To John H. Moore, E-q., Prothonotary.

(Endorsed:) Filed Feb. 4, 1914. John H. Moore, Prothonotary.

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[fol. 121] SUMMONS

CLEARFIELD COUNTY, ss:

The Commonwealth of Pennsylvania to the sheriff of said county, Greeting:

We command you, that you summon Geo. H. Lum & W. B. Stephenson so that they be and appear before our Court of Common Pleas, to be holden at Clearfield in and for said county, on the First Monday of March next, then to answer Frank Stanton Cawley of a plea in assumpsit, damages not exceeding $10,000.00, and have you then and there this writ.

Witness the Hon. Singleton Bell, President of our said Court, at Clearfield, Pa., the 4th day of Feb., Anno Domini one thousand nine hundred and 14.

John H. Moore, Prothonotary.

Acceptance of Service

Now, February 4th, 1914, we hereby accept service of the within summons and waive service thereof by the Sheriff and also accept service of copy of Plaintiff's statement.

Geo. H. Lum. Murray O'Laughlin, Attys. for W. B. Stephenson.

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[Title omitted]

STATEMENT OF FACTS

The plaintiff, Frank Stanton Cawley, claims of the defendants, Geo. H. Lum and W. B. Stephenson, the sum of five thousand

($5,000.00) dollars, with interest thereon from the 7th day of February, 1908, at the rate of six per cent per annum, payable semi-annually, upon the cause of action, whereof the following is a statement.

The defendants, Geo. H. Lum and W. B. Stephenson, on the 7th day of February, 1908, Little Falls, Minn., made their promissory note, whereof the following is a true and correct copy:

[fol. 122] $5,000.00. Little Falls, Minn., Feb. 7th, 1908.

Four years after date we promise to pay to the order of F. E. Cawley five thousand dollars at Little Falls, Minn., value received, with interest after date at the rate of 6 per cent per annum payable semi-annually.

Geo. H. Lum, W. B. Stephenson.

No. —. Due —— —, ——.

(Endorsed on back:) Interest hereon paid to Feb. 28, 1908. Interest hereon ($132.57) paid, being interest to Aug. 7th, 1908. Pay Frank Stanton Cawley or order. F. E. Cawley.

That the said written instrument was a negotiable instrument and was delivered by the Defendant to F. E. Cawley for the purpose of giving effect to the said instrument and was negotiated by said F. E. Cawley by endorsement and delivery by the Plaintiff herein named.

Plaintiff received with said note as collateral security therefore a certificate for fifty shares of the capital stock of the North Western Milling Company of the par value of one hundred ($100.00) dollars per share. Neither the payee of said note, F. E. Cawley, or the Plaintiff have received anything whatever on account of said collateral and the same is still in possession of the Plaintiff and upon payment of the amount of said note, with interest and costs of this suit, Plaintiff will delivery the said Certificate of Stock to the said Defendants. Defendants upon demand, being made for payment of [fol. 123] the note according to the tenor and effect thereof, have neglected to pay the same or any part thereof, except the interest as credited thereon.

Wherefore, the Plaintiff brings this suit to recover from the Defendants the sum of five thousand ($5,000.00) dollars, together with interest thereon from August 7th, 1908, at the rate of six per cent per annum, payable semi-annually and costs.

Roland Swoope, Attorney for Plaintiff.

STATE OF MASSACHUSETTS,
County of Middlesex, ss:

Frank Stanton Cawley, the Plaintiff in the foregoing action being duly sworn, according to law, doth depose and say that the facts set forth in the foregoing statement are true and correct.

Frank Stanton Cawley.

Sworn and subscribed before me this 29th day of January A. D. 1914. George H. Carrick, Notary Public. My commission expires Dec. 21, 1917.

(Endorsed:) Filed Feb. 4, 1914. John H. Moore, Prothonotary.

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[Title omitted]

[fol. 124] AFFIDAVIT OF W. B. STEPHENSON

CLEARFIELD COUNTY, ss:

Personally appeared before me, John H. Moore, Prothonotary, W. B. Stephenson, one of the above named defendants, who being duly sworn according to law, says that he has a full and just defense to the whole of Plaintiff's claim, the nature and character of which is as follows:

First. That plaintiff is not the owner or holder for value or consideration of the note of $5,000.00 on which this action is brought but is the mere custodian for the purpose of this action.

Second. That there was never an assignment or transfer of said note but a mere delivery without value and that delivery was made long after the maturity of said note and after the note had lost its negotiability.

Third. That F. E. Cawley, the payee, actual holder and owner of said note gave no value or consideration for said note.

Fourth. That at the time this note was given the said F. E. Cawley, held and owned large shares of stock of the Northwestern Milling Company at Little Falls, Minnesota, of which he purported or attempted to assign to said W. B. Stephenson but of which he is still the owner and holder.

Fifth. That at the time this note was given said shares of stock of the Northwestern Milling Company were worthless and of no value and the Northwestern Milling Company was insolvent and within a few months thereafter was adjudged bankrupt.

Sixth. That at the time this note was given the said F. E. Cawley well knew of the worthless value of said stock and of the insolvency of said Northwestern Milling Company.

[fol. 125] Seventh. That at the time this note was given George H. Lum, one of the defendants, was President of the Northwestern Milling Company and had entire control of its management and operation.

Eighth. That at the time this note was given and during most of the period since there has been a close allied business relation between George H. Lum and F. E. Cawley.

Ninth. That at the time this note was given both George H. Lum and F. E. Cawley well knew of the insolvent and bankrupt condition of the Northwestern Milling Company.

Tenth. That W. B. Stephenson never knew of the insolvency of the Northwestern Milling Company until after this note was given and at or about the time the Northwestern Milling Company was adjudged bankrupt.

Eleventh. That F. E. Cawley and George H. Lum together entered into a scheme to cheat and defraud W. B. Stephenson by the method herein set out.

Twelfth. That F. E. Cawley and George H. Lum subsequent to the giving of this note agreed with each other to release and discharge George H. Lum from liability on this note and F. E. Cawley has accepted and received certain property from George H. Lum in consideration thereof.

All of which defendant, W. B. Stephenson, believes and expects to be able to prove on the trial of this case.

W. B. Stephenson.

Sworn and subscribed to this 24 day of February, A. D. 1914.
John H. Moore, Prothonotary.

(Endorsed:) Filed Feb. 25, 1914. John H. Moore, Prothonotary.

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[fol. 126] [Title omitted]

STIPULATION AND ENTRY OF JUDGMENT

We the subscribers hereto, the defendants above named, agree as a settlement of the said case that there be judgment entered against us for the sum of Five Thousand Dollars with interest thereon from August 7th, 1908, and the record costs.

Geo. H. Lum. (Seal.) W. B. Stephenson. (Seal.)

Witness-: Roland Swoope, J. P. O'Laughlin.

Now this 13th day of September A. D. 1915 in accordance with the said direction of the said defendants judgment is hereby entered against the said defendants for the said amount and for the said costs with interest thereon.

By the Court. Singleton Bell, P. J.

Now this 10th day of May A. D. 1915 we the said plaintiff and the said defendants are agreed that upon the payment by the said defendants, or either of them of the said judgment, debt, interest and costs, the plaintiff shall delivery to the defendant so paying said sum the collateral security which is now held by the plaintiff, to wit:

Fifty shares of the capital stock of the Northwestern Milling Company, a Minnesota corporation.

Roland Swoope, Atty. (Seal.) J. P. O'Laughlin, Atty. for Def. (Seal.)

Witness: —— ——.

Clearfield, Penna., May 10th, 1915.

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[fol. 127] ASSIGNMENT, F. S. CAWLEY TO F. E. CAWLEY

No. 30, May Term, 1914

[Title omitted]

| | |
|---|---|
| Debt | $5,000.00 |
| Int. from Aug. 7th, 1908 | ..... |
| Attorney & Tax | 5.00 |
| Pro. Moore | 15.25 |

Entered Sept. 13th, 1915.

Now, November 29th, 1919, for value received, I hereby assign and set over to F. E. Cawley the above stated judgment, debt, interest and costs.

Frank Stanton Cawley.

Witness: Lila Lo Casino.

[fol. 128] Index to Assigned to Judgment

Assignee, Cawley, F. E.; assignor, Frank S. Cawley; defendant, Geo. H. Lum; No., term, year, 30, May, 1914; amt., $5,000.00; date, Jan. 19, 1920.

[fol. 129] COPY OF JUDGMENT DOCKET ENTRY

| Defendants | Plaintiffs | Docket | No. | Term | Year | Date of lien |
|---|---|---|---|---|---|---|
| Lum, Geo. H. et al. | Frank S. Cawley. . . | 94 | 30 | May | 1914 | Sept. 13, 1915 |
| Stephenson, W. B. et al. | Frank S. Cawley. . . | 94 | 30 | May | 1914 | Sept. 13, 1915 |

| Defendants | Plaintiffs | Nature of lien | Amount | Commenc't of int. |
|---|---|---|---|---|
| Lum, Geo. H. et al. | Frank S. Cawley. . . | Judgment | $5,000.00 | Aug. 7th, 1915 |
| Stephenson, W. B. et al. | Frank S. Cawley. . . | Judgment | $5,000.00 | Aug. 7th, 1915 |

[fol. 130] CLERK'S CERTIFICATE

COMMONWEALTH OF PENNSYLVANIA,
County of Clearfield, ss:

I, Geo. W. Ralston, Prothonotary of the Court of Common Pleas in and for said County, do hereby certify that the foregoing is a full, true and correct copy of the whole record of the case therein stated, wherein Frank Stanton Cawley — plaintiff and George H. Lum and W. B. Stephenson — defendant-, so full and entire as the same remains of record before the said Court, at No. —, May Term, A. D. 1914.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, this 26 day of January, 1920.

Geo. W. Ralston, Prothonotary.

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JUDGE'S CERTIFICATE TO CLERK

I, Singleton Bell, President Judge of the Forth-sixth Judicial District, composed of the Courts of Oyer and Terminer, Quarter Sessions and General Jail Delivery, Orphans' Court and Court of Common Pleas, do certify that Geo. W. Ralston, by whom the annexed record, certificate and attestation were made and given, and who, in his own proper handwriting, thereunto subscribed his name and affixed the seal of the Court of Common Pleas of said county, was at the time of so doing and now is Prothonotary in and for said county of Clearfield the Commonwealth of Pennsylvania, duly commissioned and qualified; to all of whose acts as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere, and that the said record, certificate and attestation are in due form of law and made by the proper officer.

Singleton Bell, President Judge.

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[fol. 131] CLERK'S CERTIFICATE TO JUDGE

COMMONWEALTH OF PENNSYLVANIA,
County of Clearfield, ss:

I, Geo. W. Ralston, Prothonotary of the Court of Common Pleas in and for said county, do certify that the Honorable Singleton Bell, by whom the foregoing attestation was made and who has thereunto subscribed his name, was at the time of making thereof and still is President Judge of the Court of Oyer and Terminer, Quarter Sessions and General Jail Delivery, Orphans's Court and Court of Common Pleas, in and for said county, duly commissioned and qualified; to all whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, this 26 Day of January A. D. 1920.

Geo. W. Ralston, Prothonotary.

(Endorsed:) District Court U. S., So. Dist. W. Va. Filed this 2nd day of July, 1923. Ira H. Mottesheard, Clerk.

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[fol. 132] EXHIBIT No. 10 TO BILL OF COMPLAINT

This deed made this the 18th day of May, 1923, between W. G. Brown, J. M. Wolverton and T. W. Ayres, Special Commissioner, of the first part, and H. L. Kirtley and H. W. Herold, parties of the second part.

Whereas, The Special Commissioners in pursuance of the authority vested in them by a decree of the Circuit Court of the County of Nicholas made on the 25th day of February, 1921, in a suit in chancery therein pending in which F. E. Cawley was plaintiff and W. B. Stephenson, John W. Stephenson, Emma Thomson, Jennie Stephenson and Mary S. Weimer were defendants did sell the real estate hereinafter mentioned and conveyed according to the terms and condition required by said decree, at which said sale the said H. L. Kirtley and H. W. Herold became the purchasers for the sum of Thirty-eight Thousand Seven hundred Dollars ($38,700.00) and,

Whereas, said court by a subsequent decree made in the case on the 25th day of May, 1921, confirmed the said sale and directed a deed for the said real estate to be made to the said H. L. Kirtley and H. W. Herold by said commissioners.

Now, Therefore, this deed Witnesseth that the said W. G. Brown, J. M. Wolverton and T. W. Ayres, Special Commissioners as aforesaid, do grant unto the said H. L. Kirtley and H. W. Herold a one-fourth interest undivided in the following real estate as hereinafter set out, which real estate is situate in the County of Nicholas, and bounded and described as follows:

The first tract is bounded and described as follows, to-wit: Beginning at two chestnuts on the wagon road leading from Muddlety Creek to Clay Court House on a ridge corner to the 1200 acre tract (No. 2) and to the Ogden and Looney tract and to a tract owned by James Robinson and with the latter S. 14 W. at 18 poles crossing a drain flowing west, 55 poles to a double chestnut and chestnut oak as top of ridge corner to Robinson, thence N. 82 E. crossing point of ridge at 18 poles, 58 poles to a double chestnut on southwest brow [fol. 133] of the mountain corner to Robinson, thence S. 34½ E, at 56 poles crossing a drain flowing southwest, at 90 poles to a path at top of ridge, at 123 poles crossing a drain flowing southwest, at 158 poles crossing top of a flat ridge, in all 225 poles to three white oak stumps true corner to Elijah Bobitt's field at a rock pile and stake, thence S. 83½ W. 34.6 poles to a beech and white oak on a hill side, thence S. 44 degrees and 50 minutes W. 78 poles to a poplar and gum in laurel at the foot of hill crossing the south fork

of Meadow Creek at 35 poles, thence S. 59 E. 58 poles and 8 links to a spruce pine, beech and birch on left bank of left fork of Meadow Creek crossing a branch of Meadow creek flowing north at 7.4 poles, thence N. 47 E. 34.6 poles to a white oak on a hillside crossing said left fork at 3 poles, thence S. 7 E. 62.6 poles to two white oaks near a branch on a west hillside thence S. 66 degrees and 6 minutes W. 62 poles to a gum and hickory near top of ridge at foot of knob crossing a branch of Meadow Creek at 22 poles, thence along the ridge S. 41½ W. 79 poles to a double chestnut on point of a small ridge, thence S. 68 W. 133 poles to a chestnut oak in a low gap in the divide between the waters of Muddlety and Peter's creek at the head of Buck's Garden Creek, thence S. 55 W. 41 poles to two linds (one down) on top of the divide, thence S. 22 degrees and 40 minutes W. 31 poles to a locust at the top of the divide, thence S. 33 W. 96 poles crossing head of hollow to a double chestnut marked as a pointer in a flat at tip of the divide where two chestnut oaks stood, original corner to school land, and with the latter S. 63 degrees and 10 minutes W. 58.4 poles to a sugar original corner on top of a divide between Buck's Garden Creek and Pine run branches of Peters Creek at west end of a gap, thence N. 86 W. 20 poles to two chestnuts marked as pointers on north side of a high knob where a poplar original corner stood (poplar found down), thence S. 79 W. 8 poles and 6 links to a yellow lind original corner, thence S. 40 W. 114 poles to two chestnut oaks on the brow of a high point on said [fol. 134] dividing ridge, thence N. 80 W. 34 poles to a red oak on top of a ridge, thence S. 28 degrees and 10 minutes W. 35 poles to a red oak on *on* left side of top of a flat on said ridge, thence S. 73 W. 104 poles to a chestnut oak at top of ridge at foot of a knob, thence N. 80 W. 32 poles to a red oak and chestnut oak near top of ridge in low gap corner to said school land and a tract of 9.100 acres granted to William Wilson, and with running with the lines of Allen Rader's farm N. 33 degrees and 8 minutes, W. 279 poles to three hickories and a chestnut oak where maple stood on a hillside corner to said Wilson tract, now Allen Rader, crossing the right hand fork of Buck's Garden Creek at 207 poles, thence N. 54 W. 230 poles to a double chestnut oak at top of ridge between Buck's Garden and Twenty Mile Creek at foot of a knob corner to said Wilson grant of 9.100 acres and to the Cameron Brockerhoff lands passing top of ridge at 32 poles, at 50 poles to head of hollow flowing to the right, at 126 poles to top of ridge running southeast and northwest, thence with Brockerhoff N. 40½ E., crossing a branch of Twenty Mile Creek at 170 poles, at 222 poles another branch of said creek, at 364 poles crossing a drain of Twenty Mile Creek, at 488 poles crossing another branch of Twenty-mile, and on 609 poles to three chestnut oaks at top of ridge between Twenty Mile and Buffalo Creek, thence N. 64 W. 40 poles along said ridge to three chestnuts (down), thence S. 83 W. 38 poles to a chestnut oak on top of knob, thence N. 11 E. 48 poles crossing head of Beechy Fork of Buffalo, and on 54 poles to two hickories (one down) on a hillside, thence N. 38 E. 58 poles to a double beech on bank of a branch of Beechy

Fork, thence S. 63 E. 17 poles to two chestnut oaks and a poplar (all down), thence N. 83½ E. at 47 poles crossing Clay County road, at 98 poles crossing a branch of Robinson's fork of Buffalo, in all 127 poles to a gum on a hillside, thence N. 20 E. 41 poles to a chestnut oak on top of mountain in laurel, thence N. 24 W. 31 poles to a small gum and two chestnut oaks (down) thence N. 42 E. 68 poles to a stake with gum pointers, thence S. 23 E. 31 poles to two [fol. 135] chestnut oaks on cliff at brow of mountain, thence S. 39 degrees and 54 minutes E. at 12 poles crossing line of Wilson Survey of 93,000 acres (Cameron-Brockerhoff line) corner to Ogden and Looney tract, and with 60 poles crossing hollow draining north east, at 102 poles to a deep hollow and up same in all 224 poles to two chestnut-oaks on the northeast side of road at top of ridge at head of said hollow, thence S. 64 degrees and 24 minutes E. 106 poles crossing road to a chestnut-oak at top of ridge by side of road, and thence S. 53 W. 40 poles to two chestnuts to the beginning, containing exclusive of three reservations 3,096.9 acres. The three reservations embraced within the lines of said tract which are excepted and reserved from the operation of this conveyance are 110.5 acres of Simmett Rader's 171.7 acres for John Rader and 112.1 acres of J. S. Hill.

The Second Tract is bounded and described as follows, to-wit: Beginning at two chestnuts on ridge by the side of the Clay County Road corner to tract No. 1 (3,000 acre grant), to a tract of Ogden and Looney, and to a tract of James Robinson and with the latter N. 73 degrees and 38 minutes E. at 8½ poles crossing Clay County Road, at 40 poles crossing a hollow draining to left, at 78 poles crossing top of narrow ridge, at 88 poles to head of hollow draining to left, at 96 poles to top of ridge running north east and south west, at 140 poles to head of deep hollow draining to left, at 210 poles to top of dividing ridge between waters of Meadow Creek and Buffalo Creek, at 252 poles to head of deep hollow draining east and on 314 poles to a beech where a beech and double maple are called for (maple found down) at top of ridge on the side of a knob corner to C. F. Herold, and running thence with his lines down ridge N. 6 degrees and 35 minutes W. 80 poles to a maple and birch pointers where a poplar and red oak original corner stood, thence N. 56 degrees and 48 minutes E. at 13 poles crossing Broken-bridge Run of Muddlety Creek at 21 poles crossing the road, 28.6 poles to [fol. 136] a white oak and hickory above road on hillside, thence S. 78½ E. 49 poles to end of a point ridge, 67 poles to hollow draining to right, at 140 poles passing a high point, 190 poles to a hollow draining to right, in all 220 poles to a chestnut-oak (down) original corner thence running with lines of Anderson Herold, N. 15½ W. 91 poles to top of ridge, 156 poles to a gum, white oak and two chestnuts, near top of ridge at head of hollow draining west where a gum, maple, and beech are called for (the gum is an original corner), thence N. 32 degrees and 10 minutes east 96 poles to two beech stumps in Anderson Herold's field below point of high knob where original corner two beeches and a maple stood, thence S. 89

W. 54 poles to two sugars on east hillside, thence N. 28 W. 46 poles to end of point ridge, at 179 poles crossing a branch of Enoch Run of Muddlety Creek, 184 poles to a double chestnut and two white oaks and a poplar where a double ches-nut and two maples stood (maples down), thence N. 46 E. 60 poles passing point of a ridge, 74 poles to two spruce pines and a maple (maple dead) on right hand fork of Enoch Run corner to Anderson Herold and Remley's 510 acre tract, and with the latter N. 43 W. 132 poles to a point where stake is called for in Lot 1 of Blair Survey to a lind and dogwood corner to Remley and tract No. 3 (500 acre grant), and with the latter and Ogden and Looney S. 28 degrees and 20 minutes W. 773 poles to the beginning, containing 957.2 acres, being the remainder of Lot No. 1 of Blair survey.

The third tract is bounded and described as follows: Beginning at a stake, lind and dogwood, pointers, corner to tract No. 2 (Blair Lot No. 1) and corner to Remley's 510 acre tract, and with the latter N. 19½ E. 23 poles crossing a branch draining south east, 128 poles to head of hollow draining north east, 166 poles to top of ridge, 192 poles to head of Enoch Run, on 216 poles to a bunch of chestnuts corner to Remley and certain school lands, and with the latter N. 66 W. 70 poles to a hickory, gum, chestnut and two dogwoods, at head of Buffalo Creek corner to Cameron and Brockerhoff tract, and with [fol. 137] the latter S. 45½ W. 35 poles to top of ridge running northwest and southeast, 92 poles to a hollow draining northwest, 124 poles to top of a narrow ridge running northwest and southeast, 180 poles crossing a branch of Robinson's Fork of Buffalo Creek, 224 poles to top of a ridge, 258 poles to head of a deep hollow draining northwest, 272 poles to end of a point ridge, and up same *same* course 327 poles to two chestnuts marked where original corner two poplars stood on west hillside facing branch of Robinson's Fork, thence N. 87¼ W. 82 poles to a gum and two black oaks (latter down) at top of a ridge near a path, thence N. 18 E. 65 poles along top of ridge to two chestnut oaks near a path, thence N. 23 W. 33 poles along top of ridge to a chestnut and chestnut oak, thence S. 67 W. 23½ poles to a gum and chestnut oak on west hillside at head of hollow (latter down), thence N. 78 W. 30 poles to a poplar and two chestnuts on a west hillside by a branch of Buffalo Creek thence S. 42 W. 77 poles crossing several branches flowing north west to a small chestnut oak sapling near top of a ridge where chestnut oak and chestnut original corner stood (both found down), thence S. 1 degree and 40 minutes W. 44.6 poles to a chestnut and two chestnut oaks near top of ridge at the side of a road, thence S. 28 E. 120 poles to two gums and a chesnut at the top of a ridge near the line of the Cameron-Brockerhoff land, thence S. 21 E. 15 poles crossing Cameron et al. line, and running with the Ogden and Looney as claimed by latter 332 poles in all to a stake on line of tract No. 2 and with same N. 28 degrees and 20 minutes E. 480 poles to the beginning, containing 789.97 acres.

The three above described tracts of land lie contiguous in Hamilton, and Summerville Districts in said county of Nicholas and State

of West Virginia, on the headwaters of Buffalo Creek, Twenty Mile Creek, Peters Creek, and some of the west branches of Muddlety Creek, and aggregate 4,844.17 acres, according to a survey made by W. C. Reddy, and being the same three tracts of land a one-fourth interest in which was conveyed to W. B. Stephenson by Mary E. Rhodes of the City of Marietta, by Frank R. Ellis her attorney in [fol. 138] fact by deed dated the 5th day of March, 1902, and of record in the office of the Clerk of the County Court of Nicholas County, West Virginia, in deed book No. 39 at page 192.

The Fourth Tract bounded and described as follows, to-wit: Beginning at a stake at the edge of cleared land and by fence, and about 6 poles from where a poplar corner is called for, the stake in line of Robert G. Carden, then with Carden's line up a ridge N. 69 E. 8 poles to a chestnut on hillside, N. 22 E. 50 poles to a stake and pointers on a ridge where two hickories are called for not found, N. 64 E. 80 poles to a stake by a large rock on hillside near the top where hickory is called for, not found, N. 45 E. 20 poles to Carden's line and Abe Keffer's corner, a stake, leaving Carden's land and with Keffer, same course in all 67 poles to a chestnut oak on a ridge N. 25 degrees 45 minutes E. 41 3/5 poles to two chestnut oaks and maple on a ridge, N. 5 degrees and thirty minutes W. 74 poles to a small yellow lynn, on ridge, N. 21 degrees 30 minutes E. 44 poles to a stake and pointers in line of Rhode's tract, now Hegarty and Stephenson, and with same leaving Keffer's N. 31 degrees 45 minutes E. 8 poles to a red oak, down, on the divide between Pine Run and Buck's Garden, and along top of divide S. 79 degrees 30 minutes E. 33 7/10 poles to two chestnut oaks on high point, one down, N. 42 degrees and 30 minutes E. 106 8/10 poles to a stake where a yellow lynn is called for, not found N. 79 degrees 30 minutes E. 8 poles to a poplar not found, on side of high point, S. 85 degrees 30 minutes E. 20 poles to sugar tree on sharp ridge, N. 64 E. 58 poles to a stake with chestnut pointers, on a high point, corner to the 135 acre tract purchased by Hagerty and Stephenson from J. Haymond Robinson, leaving the Rhodes land and with the 135 acre tract S. 20 E. 32 poles to a chestnut oak, down, on a branch of Pine Run near the head, S. 16 degrees 30 minutes W. 68 poles to a chestnut oak and gum on a point S. 47 E. 19 poles to a gum and two chestnuts by a small drain, S. 20 W. 52 poles to three small [fol. 139] chestnuts on the side of a ridge, near the top, N. 73 degrees 30 minutes E. 63 poles to two chestnut oaks on the steep ground and near the top of the ridge, N. 52 degrees 30 minutes E. 24 poles to a chestnut and chestnut oak, chestnut gone, on side of a ridge near the top and corner to Robinson's 950 acre survey, leaving the 135 acre tract and with the 950 acre tract, N. 73 degrees and 30 minutes E. 144 poles to a double chestnut oak and small chestnut on top of the divide between Pine Run and Muddlety Waters, the chestnut oak is down, leaving the 950 acre tract and with the Herold S. 5 E. 18 poles to a black oak new corner, where a black oak is called for, not found, on steep ground near the top of divide, and with Herold S. 19¾ W. 46 poles to a black oak and hickory on hillside near low gap between Pine Run and Fockler's Branch S. 22

degrees 45 minutes E. 51 poles to four chestnuts saplings on a hillside below and near a rock camp S. 30 W. 29 poles to a locust and chestnut sapling on a ridge, corner to Perkins place, leaving Herold and with Perkins place, now R. M. Bryant, and S. 44 degrees 45 minutes E. 49½ poles to a poplar and chestnut on top of the divide between Pine Run and Peter's Creek, S. 60 W. 58 4/10 poles to four chestnut oaks, on top of the divide S. 61 degrees 45 minutes W. 24 poles to two hickories, and two chestnut oaks leaving the mountain and Bryant and with Horan down the mountain, N. 44 degrees and 30 minutes W. 45 poles to a poplar on flat, new corner, N. 77 degrees 30 minutes E. 25 poles cross a hollow to a small yellow lynn on a steep bank, N. 42 W. 89 8/10 poles to a poplar and beech, beech down, on a hillside, S. 62 W. 29 poles to a stake and pointers at county road, N. 44 degrees 30 minutes W. 34 6/10 poles to two chestnut oaks on a high ridge standing 30 feet apart, S. 45 degrees 15 minutes W. 157 6/10 poles to pointers on a ridge, in B. L. Rader's field and corner to Rader, and with N. 11 W. 161 poles to a birch and pointers on a hillside, old call, beech, birch and maple. S. 63 W. 91 6/10 poles, crossing Pine Run at 13 poles to a white oak and [fol. 140] dogwood in cove, S. 8 W. 155 poles to a chestnut oak, S. 70 W. 210 poles to the beginning, containing three hundred and ninety-eight and one half acres (398½), which said tract of land lies on the waters of Peter's Creek in Summersville District of said Nicholas County, and being the same tract of land a one-fourth interest in which was conveyed to W. B. Stephenson by James S. Craig, Michael C. Duffy, James B. Duffy, Terence J. Duffy, Francis F. Duffy and Owen J. Duffy, by deed dated the 18th day of January, 1906, and now of record in said Clerk's office in Deed Book No. 43, at page 53.

Fifth Tract. Also a one-twenty-fourth (1/24) interest undivided in the following tract or parcel of land which is bounded and described as follows, to-wit: Beginning at a chestnut oak near a low gap at the head of the left hand fork of Buck's Garden Creek corner to a survey of 3,000 acres made for John H. Robinson and with three lines of same S. 51 W. 38 poles to two lynns, S. 28 W. 34 poles to a locust, S. 31 W. 90 poles to two chestnut oaks on a ridge, and leaving S. 32 E. 37 poles to a chestnut oak in a drain of the Pine Run, S. 14 W. 70 poles to two chestnut oaks and a gum on the end of a laurel point facing Pine Run, S. 47 E. 18 poles to two chestnuts and a gum near a drain of same, S. 19 W. 52 poles to two chestnuts on the point of a ridge facing B. L. Rader's, N. 73 E. 64 poles to two chestnut oaks near the top of the main mountain, N. 50 E. 24 poles to a chestnut and chestnut oak, corner to said 950 acres and with four lines of same, N. 47½ E. 60 poles to a gum on a rich hillside, N. 14 W. 80 poles to a white oak on a hillside, crossing Meadow Creek above Upper forks of the left hand fork at 16 and 34 poles, thence N. 11½ E. 12 poles crossing the Spring Branch near its mouth to two beeches on a hillside, N. 62 W. 34 poles to the beginning, containing 135 acres, which said tract of land lies on the head waters of Peters Creek and the head waters of Meadow Creek a tributary of Meadow Creek in Summersville District of said Nicholas County, and being the same tract of land conveyed by J. Haymond

[fol. 141] Robinson and others to A. L. Hagerty by deed dated the 17th day of July, 1903, and of record in the office of the Clerk of the County Court of said Nicholas County, West Virginia, in Deed Book No. 37, at page 524, and the same tract or parcel of land a one-twenty-fourth (1/24) interest undivided in which was conveyed to W. B. Stephenson by A. L. Hagerty and wife by deed dated March 16th, 1908 and now of record in said clerk's office in Deed Book No. 49 at page 294.

Sixth Tract. Also a one-fourth (¼) interest undivided in and to the lands inside the Rhodes Survey as run by I. A. Dix, as conveyed to W. B. Stephenson by Abe Keiffer, by deed dated June 15th, 1904, together with the rights as set out in said deed, which said deed is of record in said clerk's office in Deed Book No. 39 at page 200.

Witness the following signatures and seals:
W. G. Brown (Seal), J. M. Wolverton (Seal), T. W. Ayres (Seal), Special Commissioners.

($40.00 I. R. Stamps.)

STATE OF WEST VIRGINIA,
County of Nicholas, To wit:

I, H. C. Hill, a Notary Public in and for said county and state, do certify that W. G. Brown, J. M. Wolverton and T. W. Ayres, whose names are signed to the foregoing deed bearing date the 18th day of May, 1923, as Special Commissioners, have this day acknowledged the same before me in my said County.

Given under my hand this the 18th day of May, 1923.
Henry C. Hill, Notary Public. My commission expires June 27th, 1926.

[fols. 142 & 143] STATE OF WEST VIRGINIA,
Nicholas County:

Court Clerk's Office

May 18, 1923.

This deed having $40.00 I. R. Stamps, duly cancelled, was this day presented in said office, and thereupon, together with the certificate thereto annexed, is admitted to record.

Teste:

C. E. Stephenson, Clerk.

STATE OF WEST VIRGINIA,
Nicholas County:

Court Clerk's Office

June 13, 1923.

I, C. E. Stephenson, Clerk of said Court do hereby certify that the foregoing is a true copy of a deed from W. G. Brown et al., Commissioners, to H. L. Kirtley and H. W. Herold of record in my office, in Deed Book No. 72, page 404.

Given under my hand this the 13th day of June, 1923.
Teste:

C. E. Stephenson, Clerk.

(Endorsed:) District Court U. S., So. Dist. W. Va. Filed this 2nd day of July, 1923. Ira H. Mottesheard, Clerk.

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[fol. 144] IN UNITED STATES DISTRICT COURT

SUBPŒNA IN EQUITY—July 2, 1923

UNITED STATES OF AMERICA,
Southern District of West Virginia, ss:

The President of the United States of America to the marshal of the Southern District of West Virginia, Greeting:

You are hereby commanded to summon H. L. Kirtley and H. W. Herold, citizens and residents of the Southern District of West Virginia, and F. E. Cawley, a citizen and resident of the State of Massachusetts, if they be found in your District, to be and appear in the District Court of the United States, for the Southern District of West Virginia, aforesaid, in the Clerk's Office of said Court, at Charleston, on the 21st day of July, 1923, to answer a certain Bill in Equity, filed and exhibited in said Court against them by John W. Stephenson, Emma Thomson, Jennie Stephenson, Mary S. Weimer, and W. B. Stephenson.

Hereof you are not to fail under the penalty of the law thence ensuing, and have you then and there this writ.

Witness the Honorable George W. McClintic, Judge of the District Court of the United States, for the Southern District of West Virginia, this 2nd day of July, 1923, and in the 147th year of the Independence of the United States of America.

Attest:

Ira H. Mottesheard, Clerk D. C. U. S., S. D. W. Va. (Seal.)

Memorandum

The said defendants are required to file an answer or other defense in this suit in the Clerk's Office of said Court, on or before the twen-[fols. 145 & 146] tieth day after service, excluding the day thereof; otherwise the said bill may be taken pro confesso.

Ira H. Mottesheard, Clerk.

Acceptance of Service

I hereby accept legal service of the within writ this 5th day of July, 1923.

H. L. Kirtley, by Alderson & Breckinridge, Attys.

[File endorsement omitted.]

[fol. 147] IN UNITED STATES DISTRICT COURT

ALIAS SUBPŒNA IN EQUITY—Filed September 5, 1923

UNITED STATES OF AMERICA,
Southern District of West Virginia, ss:

The President of the United States of America to the marshal of the Southern District of West Virginia, Greeting:

You are hereby commanded, as heretofore, to summons H. L. Kirtley, H. W. Herold, and F. E. Cawley, if they be found in your District, to be and appear in the District Court of the United States, for the Southern District of West Virginia, aforesaid, in the Clerk's office of said Court, at Charleston, on the 5th day of September, 1923 to answer a certain Bill in Equity, filed and exhibited in said Court against them by John W. Stephenson, Emma Thomson, Jennie Stephenson, Mary S. Weimer, and W. B. Stephenson.

Hereof you are not to fail under the penalty of the law thence ensuing, and have you then and there this writ.

Witness the Honorable George W. McClintic, Judge of the District Court of the United States, for the Southern District of West Virginia, this 18th day of August, 1923, and in the 148th year of the Independence of the United States of America.

Attest:
Ira H. Mottesheard, Clerk D. G. U. S., S. D. W. Va. (Seal.)

Memorandum

The said defendants are required to file an answer or other defense in this suit in the Clerk's office of said Court, on or before the twentieth day after service, excluding the day thereof; otherwise the said bill may be taken pro confesso.

[fol. 148] Ira H. Mottesheard, Clerk.

Acceptance of Service

Service of the within summons accepted by me on this the 21st day of August, 1923.

H. W. Herold.

[File endorsement omitted.]

[fol. 149] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF A. J. HORAN—Filed September 5, 1923

STATE OF WEST VIRGINIA,
County of Kanawha, To wit:

In this cause A. J. Horan makes oath in due form of law and states that he is one of the Attorneys for plaintiff in the above styled cause; that F. E. Cawley, one of the defendants to this cause is not an inhabitant of or found within the Southern District of West Virginia; that the said F. E. Cawley has not voluntarily appeared to this action; that the said F. E. Cawley is a citizen, resident and inhabitant of the State of Massachusetts to the best of affiant's knowledge, information and belief.

A. J. Horan, Affiant.

Sworn to and subscribed before me this 5th day of September, 1923. J. W. Riley, Notary Public. My commission expires April 9th, 1931.

[File endorsement omitted.]

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[fol. 150] IN UNITED STATES DISTRICT COURT

MOTION FOR ORDER OF PUBLICATION—Filed September 5, 1923

[Title omitted]

Now comes John W. Stephenson, Emma Thomson, Jennie Stephenson, Mary S. Weimer and W. B. Stephenson and moves this honorable court for an order to proceed under Section 57 of the Judicial Code of the United States to obtain service upon F. E. Cawley by publication upon the grounds that personal service upon the said F. E. Cawley is not practicable, he being a resident and inhabitant of the State of Massachusetts.

A. J. Horan, Brown, Jackson & Knight, Attorneys for Plaintiffs.

[File endorsement omitted.]

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[fol. 151] IN UNITED STATES DISTRICT COURT

ORDER OF PUBLICATION—September 5, 1923

[Title omitted]

Upon the motion of A. J. Horan and Brown, Jackson & Knight, Counsel for the plaintiffs in the above styled cause, and it appear-

ing to the court that the defendant F. E. Cawley is not an inhabitant of or found within this district, nor voluntarily entered his appearance herein, and that personal service upon the said defendant F. E. Cawley is not practicable, it is hereby ordered that said defendant F. E. Cawley appear, plead, answer or demurrer to the said bill filed by the plaintiffs herein by the 1st day of November, 1923, and in default thereof that the court will proceed to the hearing and adjudication of said suit; and that this order be published in a newspaper of general circulation, to-wit: The Mail once a week for six consecutive weeks.

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[fol. 152] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF B. H. ANDERSON—Filed October 13, 1923

STATE OF WEST VIRGINIA,
Kanawha County, To wit:

I, B. H. Anderson Business Mgr. a Daily Republican Newspaper, published in the City of Charleston, Kanawha County, West Virginia, do solemnly swear that the annexed notice of J. W. Stephenson et al. Defendants in Chancery #1319 was duly published in said paper once a week for Six successive Weeks commencing with the issue of the 6th day of Sept., 1923, and ending with the issue of the 11th day of Oct., 1923, and was posted at the front door of the Court House of said Kanawha County, West Virginia, on the 6th day of Sept. 1923.

B. H. Anderson, Bus. Mgr.

Subscribed and sworn to before me this 11th day of October, 1923. C. Edwards Anderson, Notary Public of Kanawha County, West Virginia. My commission expires January 7th, 1929. (Notary Seal.)

Printer's Fees, $19.60.

Annexed Notice

At a District Court of the United States for the Southern District of West Virginia, continued and held at Charleston, in said district, on Wednesday, the 5th day of September, A. D. 1923, the following order was made and entered of record:

[fol. 153] In Chancery. No. 1319

JOHN W. STEPHENSON, EMMA THOMPSON, JENNIE STEPHENSON, MARY S. WEIMER, and W. B. STEPHENSON, Plaintiffs,

vs.

H. L. KIRTLEY, H. W. HEROLD, and F. E. CAWLEY, Defendants

Upon the motion of A. J. Horan and Brown, Jackson & Knight, counsel for the plaintiffs in the above styled cause, and it appearing

to the court that the defendant, F. E. Cawley, is not an inhabitant of or found within this district, nor voluntarily entered his appearance herein, and that personal service upon the said defendant, F. E. Cawley, is not practicable, it is hereby ordered that said defendant, F. E. Cawley, appear, plead, answer or demurrer to the said bill filed by the plaintiffs herein by the first day of November, 1923, and in default thereof that the court will proceed to the hearing and adjudication of said suit; and that this order be published in a newspaper of general circulation, to-wit: The Mail, once a week for six consecutive weeks.

A true copy from the record.

Attest: Ira H. Mottesheard, Clerk.

[File endorsement omitted.]

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[fol. 154] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS BILL OF COMPLAINT—Filed October 26, 1923

To the Honorable George W. McClintic, judge of the District Court of the United States for the Southern District of West Virginia:

Said defendants, H. L. Kirtley and H. W. Herold, jointly and severally, move the Court to dismiss plaintiffs' bill upon grounds hereinafter set out in the answer filed herewith and upon grounds to be stated at the bar of this Court upon a hearing of said motion.

[File endorsement omitted.]

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[fol. 155] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT—March 31, 1924

This cause came on this day to be heard upon process the service of which is duly accepted by the said defendants H. L. Kirtley and H. W. Herold; upon the bill and exhibits regularly filed herein, upon the order of publication duly executed as to the defendant F. E. Cawley a non-resident of the State of West Virginia; upon the motion of said defendants H. L. Kirtley and H. W. Herold to dismiss the bill filed herein, and was argued by counsel.

Upon consideration of all of which the court was of the opinion that the Circuit Court of Nicholas County under the laws of the State of West Virginia had jurisdiction of the suit of F. E. Cawley

against W. B. Stephenson and others, and that the decrees entered amended and supplemental bill, which leave is granted and said amended and supplemental bill accordingly filed. And thereupon the said defendants H. L. Kirtley and H. W. Herold renewed their motion to dismiss the bill and also to dismiss the amended and supplemental bill, upon consideration of which motion the court is of opinion that the said motion is well taken and that the same should be sustained.

It is therefore adjudged, ordered and decreed that said motion be and the same hereby is sustained, and that the plaintiffs' bill and amended and supplemental bill be and the same hereby are dismissed; and it is further ordered that the plaintiffs do pay unto the [fol. 156] defendants H. L. Kirtley and H. W. Herold their costs about their defense in this behalf expended.

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[fol. 157] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED AND SUPPLEMENTAL BILL OF COMPLAINT—Filed March 31, 1924

To the Honorable George W. McClintic, judge of the District Court of the United States for the Southern District of West Virginia:

therein are not void.

And thereupon the plaintiffs asked leave of the court to file an

The plaintiffs above named file this their Amended and Supplemental Bill of Complaint and say:

First

That they have heretofore filed their original bill herein to which reference is here made and the same asked to be read and treated as a part of this amended and supplemental bill as full and to the same extent as though herein fully and at length incorporated.

Second

That the action of the Circuit Court of Nicholas County, West Virginia, by which the said court decreed and adjudged that the deeds referred to in the original bill from said W. B. Stephenson to his coplaintiffs were fraudulent and void, without hearing any evidence or having any trial upon said question, and without the personal services of process upon any of the defendants in said suit, being the plaintiffs in this suit, and decreeing their lands to sale in satisfaction of the debt therein referred to, was and is a denial of due process of law to the said plaintiffs and was and is in violation of the Fourteenth Amendment to the Constitution of the United

States prohibiting the taking of private property without due process [fol. 158] of law, and that the matters involved in this suit involve the application of said provision of the Constitution of the United States.

Third

Plaintiffs reiterate the prayer of their original bill and pray for all such other, further and general relief as is equitable and just and suited to their case.

John W. Stephenson, Emma Thomson, Jennie Stephenson, Mary S. Weimer, W. B. Stephenson, by Counsel. A. J. Horan, Brown, Jackson & Knight, Counsel for Plaintiffs.

[File endorsement omitted.]

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[fol. 159] In United States District Court

[Title omitted]

Order Allowing Appeal—Filed March 31, 1924

On this 31st day of March, 1924, came the plaintiffs in the above styled cause and presented to the court their petition praying for an appeal from the decree entered herein dismissing their suit, to the Supreme Court of the United States, and with said petition tender an assignment of errors, which petition and assignment of errors are ordered to be filed.

Upon consideration of said petition and assignment of errors an appeal is allowed as prayed for in said petition, and it is also ordered that the said decree be superseded and upon the appellants' executing a bond in the penalty of $1,000.00 conditioned as required by law.

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[fol. 160] In United States District Court

[Title omitted]

Petition for Appeal—Filed March 31, 1924

To the Honorable George W. McClintic, judge of said Court:

Now come John W. Stephenson, Emma Thomson, Jennie Stephenson, Mary S. Weimer and W. B. Stephenson, plaintiffs, by Brown, Jackson & Knight and A. J. Horan, their attorneys, and feeling themselves aggrieved by the final decree of this court entered on the 31st day of March, 1924, hereby pray that an appeal may be allowed to them from said decree to the Supreme Court of the United States, and in connection with this petition petitioners herewith present their assignment of errors.

Petitioners further pray that an order of supersedeas may be entered herein pending the final disposition of such appeal, and that the amount of security may be fixed by the order allowing this appeal.

A. J. Horan, Brown, Jackson & Knight, Counsel for Petitioners.

[File endorsement omitted.]

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[fol. 161] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed March 31, 1924

Now come the petitioners John W. Stephenson Emma Thomson, Jennie Stephenson, Mary S. Weimer and W. B. Stephenson, by Brown, Jackson & Knight and A. J. Horan their attorneys, and in connection with their petition for appeal say that in the record of proceedings and in the final decree aforesaid manifest error has intervened to the prejudice of the petitioners, to-wit:

First

The court erred in sustaining the motion of the defendants to dismiss the bill herein.

Second

The court erred in not holding that the action of the Circuit Court of Nicholas County in setting aside the deeds filed as Exhibits No. 7 and No. 8 with the bill as fraudulent and void and decreeing the lands referred to in said bill *to* sale, without hearing any evidence, was a denial of due process of law to the petitioners in said suit and in violation of the Fourteenth Amendment to the Constitution of the United States.

Third

The court erred in holding that your petitioners were not denied due process of law by the Circuit Court of Nicholas County in entering the decree setting aside the deeds filed with the original bill in this case as Exhibits No. 7 and No. 8 without hearing any evi-[fol. 162] dence upon said question and without any service of process upon your petitioners or either of them.

Wherefore petitioners pray that the decree of the District Court of the United States for the Southern District of West Virginia may be reversed.

A. J. Horan, Brown, Jackson & Knight, Attorneys for Petitioners.

[File endorsement omitted.]

[fol. 163] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed March 31, 1924

The Clerk of the District Court of the United States for the Southern District of West Virginia, in making up the transcript of the record in this case for transmission to the Supreme Court of the United States, is requested to include therein the following as constituting such transcript, to-wit:

1. The summons, with the acceptance of service thereof by the defendants Kirtley and Herold.
2. The affidavit of A. J. Horan for substituted service against the defendant F. E. Cawley.
3. The motion for such substituted service.
4. The order granting the motion for substituted service.
5. The order of publication, with the publisher's certificate thereon.
6. The plaintiffs' bill and all of the exhibits therewith filed.
7. The motion to dismiss.
8. The amended and supplemental bill.
9. The order sustaining the motion to dismiss and dismissing the cause.
10. The order granting an appeal to the Supreme Court of the United States.
11. The assignment of errors.
12. Clerk's certificate.

A. J. Horan, Brown, Jackson & Knight, Attorneys for Plaintiffs.

[fol. 164] Service of the above notice is accepted and the papers therein indicated to be included in the transcript are sufficient to present the questions arising in the case.

A. N. Beckinridge, Mathews, Campbell & McClintic, Attorneys for Defendants H. L. Kirtley and H. W. Herold.

[File endorsement omitted.]

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[fols. 165 & 166] BOND ON APPEAL FOR $1,000—Approved and filed May 2, 1924; omitted in printing

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[fol. 167] CITATION—In usual form, showing service on Mathews, Campbell & McClintic; omitted in printing

[fol. 168] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Southern District of West Virginia, ss:

I, Ira H. Mottesheard, Clerk of the District Court of the United States for the Southern District of West Virginia, do certify that the foregoing is a true and complete transcript of the record in the case of John W. Stephenson, et al., vs. H. L. Kirtley, et al., in accordance with the Præcipe filed in said case, and now of record and on file in my office.

In testimony whereof I hereto set my hand and the seal of said Court, at Charleston, in said District, this 7th day of May, A. D., 1924, and in the 148th year of the Independence of the United States of America.

Ira H. Mottesheard, Clerk D. C. U. S., S. D. W. Va. (Seal of District Court United States, Southern District of West Virginia, Charleston, West Va.)

Endorsed on cover: File No. 30,324. S. West Virginia D. C. U. S. Term No. 381. John W. Stephenson, Emma Thomson, Jennie Stephenson, et al., appellants, vs. H. L. Kirtley, H. W. Herold, and F. E. Cawley. Filed May 9, 1924. File No. 30,324.

IN THE

# Supreme Court of the United States

---------- TERM, 1925.

No. 381 58

JOHN W. STEPHENSON, EMMA THOMSON, JENNIE STEPHENSON, MARY S. WEIMER, and W. B. STEPHENSON, *Appellants,*

*v.*

H. L. KIRTLEY, H. W. HEROLD, and F. E. CAWLEY, *Appellees.*

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.*

BRIEF FOR THE APPELLANTS.

A. J. HORAN,
BROWN, JACKSON & KNIGHT,
Attorneys for Appellants.

LON H. KELLY,
HERMAN L. BENNETT,
Of Counsel.

LOVETT PRINTING CO., LAW PRINTERS, CHARLESTON, W. VA.

# INDEX



## CITATIONS

IN THE

# Supreme Court of the United States

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---------- TERM, 1925.

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## No. 381

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JOHN W. STEPHENSON, EMMA THOMSON, JENNIE STEPHENSON, MARY S. WEIMER, and W. B. STEPHENSON, *Appellants*,

*v.*

H. L. KIRTLEY, H. W. HEROLD, and F. E. CAWLEY, *Appellees.*

---

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.*

---

BRIEF FOR THE APPELLANTS.

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### STATEMENT.

This is a suit in equity instituted in the District Court of the United States for the Southern District of West Virginia, in the month of June, 1923, in which John W. Stephenson, Emma Thomson, Jennie Stephenson, Mary S. Weimer and W. B. Stephenson are plaintiffs and H. L. Kirtley, H. W. Herold and F. E. Cawley are defendants.

The object and purpose of this suit is to have set aside, cancelled and annulled certain decrees of the Circuit Court of Nicholas County, West Virginia, entered in that court on February 25, 1921, and on May 20, 1921, and a deed, in pursuance of said last named decree, made by special commissioners, Brown, Wolverton and Ayers, to the defendants Kirtley and Herold.

The plaintiffs are all non-residents of the State of West Virginia, and they, except W. B. Stephenson, are the joint owners of a one undivided fourth interest in certain lands in said Nicholas County in the Southern District of West Virginia, containing in the aggregate more than 5,000 acres, and those four plaintiffs who own said interest hold the same in the following proportions: J. W. Stephenson 3/48 of the whole, Emma Thomson 5/48 thereof, Jennie Stephenson 2/48 thereof, and Mary S. Weimer 2/48 thereof. This one-fourth interest in said lands was originally acquired by plaintiff W. B. Stephenson, with funds belonging to himself and his five brothers and sisters, who, in acquiring the same, was acting for himself and his five brothers and sisters, four of whom are the four plaintiffs first named above. W. B. Stephenson, instead of taking title to said one-fourth interest jointly in the name of himself and his five brothers and sisters, took the legal title in his own name, whereas the deeds conveying said lands should have named John W. Stephenson, Emma Thomson, Jennie Stephenson, Mary S. Weimer, then Mary R. Stephenson, W. B. Stephenson and Catherine J. Stephenson as grantees, each taking one-sixth of the one-fourth interest in said lands.

Shortly after W. B. Stephenson so took the title in his own name he, on December 31, 1902, executed and delivered to his said brothers and sisters named above a

declaration of trust which discloses the uses to which he held such title and the real interests of the plaintiffs as the same then were and as herein stated (R. 18).

Later plaintiffs J. W. Stephenson and Emma Thomson purchased from their sister Catherine J. Stephenson her one-sixth of the one-fourth interest in said lands, and afterwards, on February 26, 1908, W. B. Stephenson executed a deed whereby he conveyed to plaintiff Jennie Stephenson the one-sixth of said undivided one-fourth, to Mary S. Weimer one-sixth of said one-fourth, to John W. Stephenson three-twelfths of said one-fourth, and to Emma Thomson three-twelfths of said one-fourth, leaving in himself one-sixth of said one-fourth (R. 21). Later plaintiff Emma Thomson purchased from W. B. Stephenson his interest in said lands, and by deed dated January 12, 1911, he conveyed such interest to her (R. 23).

The plaintiff W. B. Stephenson was, during the time of the several transactions aforesaid, and still is a citizen and resident of the State of Pennsylvania.

In the year 1915, in a suit previously instituted in the Court of Common Pleas for Clearfield county, Pennsylvania, the defendant F. E. Cawley, a citizen and resident of the State of Massachusetts, recovered a judgment against said W. B. Stephenson and by assignment to him became the owner of three other judgments against said W. B. Stephenson, recovered in the same court.

In February, 1920, the defendant F. E. Cawley instituted, in the Circuit Court of Nicholas County, West Virginia, a suit in equity naming as defendants the plaintiffs in this cause. The bill filed by Cawley in that suit (R. 28) charges that the two deeds of February 28, 1908, and January 12, 1911, were executed by W. B. Stephenson for the purpose of hindering, delaying and defrauding

creditors and especially the plaintiff to that bill, and prayed that the same be set aside and cancelled.

In Cawley's suit in the Circuit Court of Nicholas County jurisdiction rests upon substituted service of process by order of publication (R. 27), supplemented by an affidavit for an order of attachment (R. 33), and order of attachment (R. 34).

The order of publication in the caption thereof and in styling the case contains the name of Emma *Thomas* as a defendant instead of Emma Thomson, which was doubtless intended (R. 27). There is no evidence in the record of the posting of the order of publication; the affidavit for the order of attachment is insufficient; and the order of attachment does not direct or authorize its levy upon the property or estate of either of the plaintiffs who then owned and held the title to said interest in said lands, but directs the attaching of the estate of plaintiff W. B. Stephenson who had before that time divested himself of all right or title to the lands in question.

A decree (R. 36) was rendered in said cause by the Judge of the Circuit Court of Nicholas County upon the bill and exhibits alone and without evidence touching the allegation of fraud, which said decree cancels and annuls the two deeds aforesaid, decrees the said one-fourth interest in said lands to sale to satisfy Cawley's alleged debt against W. B. Stephenson, and grants to the plaintiff in that cause all the relief for which he prays. This decree was entered February 25, 1921, and in pursuance thereof said interest in said lands was sold May 18, 1921; the defendants H. L. Kirtley and H. W. Herold became the purchasers, and by decree entered May 20, 1921, (R. 41) said sale was confirmed and a deed directed to be made to the said purchasers; on May 18, 1923, the commissioners ap-

pointed for the purpose executed and delivered to said purchasers a deed for the said interest in said lands (R. 78). The plaintiffs here had no knowledge of the suit in the Circuit Court of Nicholas County or of the proceedings had therein until more than two years after the entry of the final decree of sale and the decree of confirmation, and under the laws of West Virginia they were not permitted to appear in said suit and defend the same after the expiration of two years from the entry of such final decree.

Being thus deprived of their right to defend their interests in said suit in Nicholas County, these plaintiffs, in July, 1923, commenced this suit in the District Court aforesaid, in which they pray for a cancellation of the said decree of February 25, 1921, the decree of May 20, 1921, and the deed made by special commissioners Brown, Wolverton and Ayers to the defendants Kirtley and Herold dated May 18, 1923, and upon motion of the defendants herein this cause was, by the judge of said District Court, dismissed, and the same is now brought here for review.

## STATUTES.

Sections 12, 13 and 14 of chapter 124, Barnes' Code of West Virginia, on the subject of orders of publication, read as follows:

> "§12. Every order of publication shall state briefly the object of the suit, and require the defendant against whom it is entered or the unknown parties to appear within one month after the date of the first publication thereof, and do what is necessary to protect their interests. It shall be published once a week for four successive weeks

in some newspaper published in the county in which the order is made or directed, if one is so published, to be designated by the party directing such order or his attorney, but if no paper be so designated, then in such paper as the circuit court may direct, or if the court make no direction, then as the clerk of the circuit court may prescribe; and if no newspaper be published in the county, then in such newspaper as the court may prescribe, or, if none be so prescribed, as the clerk may direct. It shall be deemed to have been published on the day of the fourth publication thereof. It shall be posted at the door of the court house of the county in which the court is held at least twenty days before the judgment or decree is rendered."

"§13. When such order shall have been so posted and published, if the defendants against whom it is entered, or the unknown parties, shall not appear at the next term of the court, after such publication is completed, the case may be tried or heard as to them. Personal service of a summons, *scire facias,* or notice may be made on a non-resident defendant out of this state, which service shall have the same effect, and no other, as an order of publication, duly posted and published against him. In such case the return must be made under oath, and must show the time and place of such service, and that the defendant so served is a non-resident of this state. Upon any trial or hearing under this section, such judgment, decree or order shall be entered as may appear just."

"§14. Any unknown party or other defendant,

who was not served with process in this state, and did not appear in the case before the date of such judgment, decree or order, or the representative of such, may, within two years from that date, if he be not served with a copy of such judgment, decree or order more than one year before the end of said two years, and if he was so served, then within one year from the time of such service, file his petition to have the proceedings reheard in the manner and form provided by section twenty-five of chapter one hundred and six of the code, and not otherwise; and all the provisions of that section are hereby made applicable to proceedings under this section. Provided that if such judgment or decree was made before this section as amended takes effect such petition may be filed within the time prescribed by law at the time such judgment was rendered or decree pronounced."

## ARGUMENT.

The Circuit Court of Nicholas County, West Virginia, did not have or acquire jurisdiction of the defendants to the suit of F. E. Cawley against the plaintiffs here, or of the property and estate of said defendants decreed in that cause to be sold and therein sold, for the following reasons:

## POSTING.

First. There was no completed substituted service of process as to the said defendants. True, there was an order of publication styled "F. E. Cawley, plaintiff, v. W. B. Stephenson, Emma *Thomas,* Jennie Stephenson, Mary S. Weimer and John W. Stephenson," published in a weekly newspaper published in Nicholas County, for four

successive weeks, and that fact is certified and attested by the editor and publisher of said paper (R. 27). But it does not appear in this publisher's certificate or elsewhere that any such notice was ever posted at the door of the court house of said Nicholas County. And it is here asserted that the posting of a notice of publication under the West Virginia statute is just as important and just as mandatory as the publication of such an order, and without such posting there is no substituted service. In the case of McCoy's Executors v. McCoy's Devisees, 9 W. Va. 443, it is said:

> "No decree should be rendered affecting the interest of an absent defendant unless it appear (if it be not otherwise brought before the court) that he has been regularly proceeded against by an order of publication duly published in the newspaper and posted at the front door of the court house."

The case of Coal River Navigation Co. v. William H. Webb, 3 W. Va. 438, discusses this same question, and point 4 of the syllabus reads as follows:

> "A mere recital in a decree that an order of publication was returned 'duly executed by publication in a newspaper,' &c, would not be sufficient in itself to establish it, if nothing else appeared in the papers of the cause to show how it had been executed."

Beginning on page 443 of the report just cited, and reading there and on page 444, we find the following comment by the Supreme Court of Appeals of West Virginia:

> "An objection is also urged by the appellants as

to the proof of the proper execution of the order of publication, as well as to its regularity and validity. The decree complained of recites that the order of publication as to certain non-resident defendants was returned 'duly executed by publication in the Kanawha Valley Star, a newspaper in Kanawha county, Virginia, for four successive weeks, commencing on the 13th day of August, 1860.'

If this were all the evidence in the record of the due execution of said order, it would be clearly insufficient, as it does not show a compliance with the statutory provision which then required that a copy of such order should also have been posted at the front door of the court house of the county of Kanawha, on the first day of the next county court after the order was entered.

But by an affidavit of the publisher of said paper found in the record it appears that the order was duly published in the paper, as recited in the decree, and also that a copy of the same was posted by the said appellant, at the front door of said court-house, on the first day of the next county court of said county after the order was entered. If there was no other objection to the order, therefore, there would, as I think, be no error in the decree, so far as it is founded on it, notwithstanding the recital therein, as to the due execution of the order, would be insufficient in itself to establish it."

The subject of substituted service by order of publication was again before the Supreme Court of Appeals of

West Virginia in the case of Styles v. Laurel Fork Oil and Coal Co., et al., 45 W. Va. 374, and points 2 and 3 of the syllabus in that case read as follows:

> "Where it does not appear from the record whether process was duly served, or order of publication duly published and posted, or not, except from the decree, which declares that 'process was duly served' or 'order of publication was duly executed as to the defendants,' it will be presumed that it was so served or executed."
>
> "But when the record shows the process or order of publication, and shows clearly that process was not served or order of publication executed as to any particular defendant, such declaration in the decree will not raise such presumption as to such defendant."

It is true that the decree of sale (R. 36) contains a recital to the effect that the cause came on "to be heard upon the order of publication duly executed as to the defendants who are non-residents and have been regularly proceeded against as such." But when we look to the record of the case in the Nicholas Circuit Court, every part and parcel of which is now before this court, we find that there is no evidence even purporting to show that this order of publication was ever posted, although it clearly appears that the same was published in a newspaper, and hence the recital in said decree does not raise the presumption that there was such posting.

In the cases of Laflin v. Gato and Murphy v. Gato, heard together by the Supreme Court of the State of Florida, reported in 42 So. 387, it is held that in construc-

the service by order of publication the certificate of the clerk should show the posting of a copy of the order at the door of the court house and that the fact of such posting should affirmatively appear from the record. The court said:

> "It does not appear that the clerk posted a copy of the order at the door of the court house."

Under the statutes of Alabama providing the manner by which absent defendants may be brought before a court of equity, publication is required to be made on the court house door as well as in a newspaper, and if such posting be omitted a decree cannot be sustained. In the case of Batre, et al v. Auze's Heirs, 5 Ala. 173, upon this subject, the court said:

> "It will be seen that there was no personal service of the subpoena on him, and he is attempted to be brought before the court as a non-resident defendant. The service is defective because it does not appear that any publication was made on the court house door as the statute requires as well as in a newspaper."

In the State of Mississippi the lands of a non-resident defendant may be proceeded against by his creditors only in the mode pointed out by statute and where a case goes to hearing upon proof of order of publication in the newspaper it is held that the bill should be dismissed for want of proof of proper publication, the statute requiring that notice should be posted at the door of the court house.

In the case of Zecharie v. Bowers, 11 Miss. 641, the court says:

> "The statute requires, in express terms, that 'there shall be a copy of the order posted at the front door of the court house' besides a publication in some public newspaper. It is the uniform and unbroken course of the decisions, that under all statutes which authorize the substitution of some other means for personal service of process as a foundation for the jurisdiction of the court, the most exact compliance with these requisitions will be enforced."

To the same effect is the case of McKey v. Cobb, et al, 33 Miss. 533.

It seems that in the State of Florida that as a part of substituted service a copy of the process sha'l be mailed by the clerk to the non-resident defendants. In the case of Wylly v. Sanford Loan Co., 33 So. 453, two non-resident defendants were proceeded against. It appeared from the record that the clerk's certificate showed that "a copy had been mailed to the defendant." There being two defendants the court held that the certificate of the clerk, at best, showed service upon only one of the defendants and the uncertainty as to which of them was so served, rendered a decree based thereon *prima facie* void as to both defendants.

The case of Storde v. Storde, decided by the Supreme Court of the State of Idaho, in 1898, and reported in 52 Pac. 161, is a well considered case on this subject. This case holds that all the requirements of the statute authorizing service of summons by publication must be complied with to give the court jurisdiction, and that when the record fails to show that a copy of the summons was sent to the address of the defendant, where the order directs that it be sent, service by publication is not com-

plete and does not give the court jurisdiction. It was held that unless affidavits are filed showing that all the requirements of the statute authorizing service by publication have been complied with the court has no jurisdiction to enter the judgment.

> "The decree," it is said by the court, "recites that the defendant had been duly served with the original summons," etc. "The record shows that the original summons was placed in the hands of the sheriff" and returned not found. "The record contains the affidavit of the publisher of the newspaper * * * wherein he stated that the summons was published, etc. The record fails to show that a copy of the summons and complaint was sent to the defendant as required by said order of publication."
>
> "In this case, the judgment roll in the other case was introduced in evidence and it contains no proof of the service of summons by publication or otherwise, and the evidence shows as a matter of fact no service by publication was made. This being true the court had no jurisdiction and the decree therein was absolutely void for want of jurisdiction."
>
> "The rule in service by publication seems to be that the record must show essentially all the jurisdictional facts. It follows, therefore, that the record in this case should have affirmatively shown a compliance with the statutory provisions relating to forwarding the process by mail. This it failed to do and the omission is fatal to the jurisdiction of the court below."

This case is one of collateral attack—very similar to the case at bar, and holds that despite the recital in the decree, the evidence in the record will suffice to show a failure of service by publication in accordance with the statutory requirements.

*IDEM SONANS*

The order of publication in the instant case is defective because in the caption thereto appears the name of Emma *Thomas*, whereas the name of one of the defendants to that suit, who is one of the plaintiffs to this suit, is Emma *Thomson*. It may be contended that this objection is not well taken under the recognized doctrine of *idem sonans*. But our view of it is otherwise.

> "Since the method of obtaining jurisdiction over one's personal property in an action commenced by a substituted or constructive service of process is exceptional and in derogation of any common law method of procedure, some courts take the position that no presumption in order to make good the service should be indulged that are not strictly and clearly warranted by the law sanctioning such practice and that if the service of process is made under the wrong name the service will not be validated by a resort to the doctrine of *idem sonans.*"
>
> 19 R. C. L., p. 1335.

In Schoenfeld v. Broune, et al., 159 Mich. 139, 123 N. W. 537, it was held that a published notice to "Dunton" is not sufficient to support an attachment on a property against Denton although a co-defendant was personally named, if no personal service was secured on either. Wherein it was said by the court, quoting Campbell J. in Granger v. Superior Court Judge (Mich.), 6 N. W. 848,

> "Where cases and proceedings are not according to the usual course and are special in character they are held void on slighter grounds than regular suits, because the courts have not the same power over their records to correct them. So where there has been no personal service within the jurisdiction the doctrine prevails that proceedings not conforming to statutes are void; but this is on the ground that there has been no service whatever and that the party, therefore, has not been notified in any proper way of anything."

It is further said, quoting Champlin, J., in Steere v. Vanderberg (Mich.), 35 N. W. 110,

> "It is a settled rule that all exceptional methods of obtaining jurisdiction over persons not found within the state must be confined to the cases and exercised in the way precisely indicated by the statute; and it may also be regarded as settled law that a failure to comply with the statutory requirements, where the jurisdiction conferred is special and no personal service obtained, renders the judgment null and void."

The court further says, following the language in Fanning v. Krapfi (Ia.), 14 N. W. 727, 16 N. W. 293, that

> "The question before us concerns the title to real estate and it would not be possible to base any safe rule upon the distinction between names that are peculiar and those that are not peculiar. Notice by publication even where there is no misnomer does not afford a very strong natural presumption that the fact of the pendency of the action will be

> brought to the defendant's actual knowledge. Notice by this mode is allowable only out of necessity. It must often happen that great injustice is done and great hardship suffered. We are not disposed to open the door any wider than necessity requires. Whoever undertakes to give notice by publication and misnames the defendant is without excuse. It requires very little care to publish the defendant's name correctly. We are evidently justified in holding the plaintiff who gives notice by publication to a considerable degree of strictness. * * * It appears to us that we should not open the door to mischief of which no one could see the end."

It is concluded in the case of Schoenfeld v. Broune, *supra*, that in an attachment case against Benjamin W. Bourne and William H. Denton, non-residents, where no one is personally served with process, the court does not get jurisdiction because of the publication of a notice describing the defendants as Benjamin W. Bourne and William H. *Dunton*.

The same view is taken in Steinman v. Jessee, 108 Va. 567, 62 S. E. 275, wherein the appellant was proceeded against only by order of publication, the notice of which as published gave his name as "A. J. Stainmau." In this case the court said:

> "In order to bind appellant by its decrees the proceedings against him by publication must have been strictly in compliance with the statute authorizing notice by publication. Such a notice being constructive only, in the order of publication as well as the statute authorizing it on prescribed conditions, is to be strictly construed. Unquestion-

> ably the doctrine of *idem sonans* may be invoked to cure immaterial variations in the spelling of the name but the court agrees that the spelling of the name and syllables must produce the same sound as the name. To apply the doctrine in this case where, in the *caption* of the order of publication the name is spelled 'Stainmau', *which is the notice,* while in that part of the publication regarded as the warning the name is spelled 'Stinman' and hold that the appellant should have understood that 'Steinman' was meant, would be not only to carry the doctrine beyond any authority cited or that we have been able to find, but beyond sound reason."

That the initials of the christian name of the party are correctly printed is of no importance except as a matter of secondary consideration, since the attention of one reading the notice, perchance it might be, would not be attracted by the initials of the christian name but by the surname and less common name used in the majority of cases than the initials of a christian name.

Other cases wherein it was held not to be *idem sonans* follow:

Robert Mc*R*ee for Mc*K*ee, in McKee v. Brown, 45 Tex. 546, where it was held that the court should indulge in no presumption not strictly and clearly warranted by the record in support of judgment against non-resident on constructive service.

Martha He*dr*ick for Martha He*lm*ick, in Collins v. Reger, 62 W. Va. 195, wherein it was held that the rule of

*idem sonans* was inapplicable to assessment rolls or to delinquent and sales records.

Hoonbrook for Hornbrook, in Male v. Moore, 70 W. Va. 448, in the case of an erroneous assessment of property.

Herberling for Heberling, in the case of Heberling v. Moudy (Mo.), 154 S. W. 65, wherein the court observed that the names were not *idem sonans,* were not of common derivation nor was there any evidence that one was a corruption of the other in general use.

J. A. Myer for J. A. Myers, in Myers v. DeLisle (Mo.), 168 S. W. 676, wherein the tax suit notice was held insufficient.

Kitie A. Viger for Katie A. Viger, in Miller v. Keaton (Mo.), 139 S. W. 158.

Chase Marker for Chan Marker, in Schaller v. Marker (Ia.), 114 N. W. 43.

Second. The Circuit Court of Nicholas County did not acquire jurisdiction of this cause of action, for the reason that the affidavit for the attachment is insufficient and void, and there being no other basis for the suit in Nicholas County, the court's jurisdiction never attached to the cause of action. The affidavit for the order of attachment was made by one of the attorneys for the plaintiff bringing the suit. The affidavit states that the plaintiff has a claim arising out of contract amounting to a certain sum against one of the defendants, and that the suit is brought for the purpose of recovering that claim. It then recites that the plaintiff and certain other people recovered judgments against one of the defendants in that suit for certain amounts, and that all of these judgments

have become the property of the plaintiff in that suit, and amount to a certain sum of money. But nowhere does the affidavit show that the suit is brought to recover on the cause of action shown by these judgments. It is not alleged in the affidavit or stated that the judgments constitute the cause of action upon which the attachment is based. This being true the affidavit does not anywhere state the nature of the plaintiff's claim, and without a complete statement of the nature of the plaintiff's claim the affidavit is void. In Demming National Bank v. Baker, 83 W. Va. 429, an attachment was brought upon a negotiable promissory note in an attempt to reach the property of an endorser who was a non-resident of the state. The affidavit described the note, alleged that the defendant was an endorser thereon and that the same had been duly protested. The court held the affidavit insufficient in that it failed to state that notice of the dishonor of the note had been given to the endorser; quashed the attachment and dismissed the suit. This case is enlightening for the reason that it announces the doctrine which had been frequently before announced that the statute conferring the right of attachment must be strictly construed, and that while the term "protest" ordinarily means the taking of all of the steps necessary to fix liability upon the endorser of a negotiable note, still when used in an attachment affidavit it can not be held necessarily to include the giving of notice of dishonor.

In the case of Citizens National Bank v. Dixon, 94 W. Va. 21, the court held a notice of motion for judgment insufficient because it did not appear unequivocally therein what connection one of the defendants had with the note described; and the same is true in the case of Pelley v. Hibner, 93 W. Va. 169.

It must be borne in mind that the rule controlling the sufficiency of a notice of motion for judgment is very much more liberal than that applying in the case of an attachment affidavit, and that still under this more liberal rule in these two cases the court would not allow anything to be supplied by inference; and if no omission can be supplied by inference in a notice of motion for judgment where the rule is that only substantial accuracy must prevail, still for a stronger reason can no inference be appealed to in the case of an attachment affidavit to show the correlation of the matter therein contained. It may be argued, however, that even though the attachment affidavit be void for the reasons aforesaid, still the court had jurisdiction in this case upon the ground of the alleged fraudulent transfer of the property.

It is quite true that the court has general jurisdiction of causes of action of this class, but before this jurisdiction can be exercised it must be attached in some way to the particular cause of action. This may be done by service of process upon the parties to be affected, in which case complete jurisdiction is given over their persons, or if this is not possible it may be done by attaching jurisdiction to the subject matter to be affected, as by an attachment where there is already no existing lien. But unless the jurisdiction of the court becomes attached to the cause of action in one of these two ways jurisdiction is never acquired. If the claim attempted to be asserted is already a lien against the particular property sought to be affected, then by virtue of that lien the jurisdiction can be attached to the property. If, however, a claim sought to be asserted is not a lien upon the property which it is attempted to affect, then it must be attached to that property by some sort of lien, and in this case that was attempted to be done by an attachment.

The cases relied upon in the court below to sustain the jurisdiction of the court regardless of the attachment are not apt for that purpose, for it appears that in the case of Goshorn v. Snodgrass, 17 W. Va. 717, and Watkins v. Wortman, 19 W. Va. 78, jurisdiction was had over the persons of the defendants to be affected. In each of these cases answers were filed and the matters contested, so that regardless of the attachment the court had jurisdiction of the parties whose interests were involved in the litigation.

And in the case of Danser v. Mallonee, 77 W. Va. 26, the court held that while the attachment was invalid it was not proper for the court below to dismiss the suit upon quashing the attachment, but that he should have allowed another attachment to be sued out or the plaintiffs to obtain process against the defendant. In other words, the holding simply was that while the court had not yet obtained jurisdcition of the cause it might have done so, and the plaintiffs should have been given an opportunity to effect that purpose.

Third. The Circuit Court of Nicholas County was without jurisdiction to enter the decrees complained of without personal service upon the defendants and without proof of the allegations of the fraudulent transfer of the land as charged in the bill. Even though the court had jurisdiction of the cause of action, which is of course denied, it did not have jurisdiction to enter the decree of sale at the time it was rendered. In a cause which is being proceeded with *ex parte* as was the case here, the jurisdiction of the court must exist to enter each decree that is rendered, and the things must be done which are necessary to confer jurisdiction as each particular step

is taken. No decree *pro confesso* can be entered upon an order of publication, but the plaintiff must prove his case before the court has any jurisdiction to enter a decree. The decree entered shows that the case was brought on to be heard upon the order of publication, upon the plaintiff's bill and exhibits, upon the affidavit for attachment and the attachment and the levy thereon. There was no proof taken in the case to show that the transfer of the property by the one defendant to his co-defendants was fraudulent; and without a word of proof upon this question the court adjudicated that such was the case. If there had been offered some evidence upon this question, which was the only question in the case, and its sufficiency was denied, of course the determination of the trial court would be final; but where the record affirmatively shows as it does in this case, that no evidence whatever was taken upon the point, then the attempt by the court to enter a decree which was in effect a decree *pro confesso,* is absolutely void, for it did not have any jurisdiction to enter the decree declaring the deeds fraudulent until some evidence was offered to that effect. It was in effect a fraud upon the rights of the defendants for it can not be doubted that if the plaintiff had proceeded to take evidence upon this question the defendants would have become possessed of information of the pendency of the suit and would have come in and made defense thereto.

Section 13, chapter 124, West Virginia Code, copied herein, it will be remembered, says that if the defendants shall not appear *"the case may be tried or heard as to them."* Manifestly a trial or hearing is contemplated, and proof of essential facts required by this statute.

In setting aside the deeds filed as exhibits No. 7 and No. 8 with the plaintiffs' bill, as fraudulent and void, and

decreeing the lands conveyed thereby to sale, without hearing any evidence in support of the said bill was a denial of due process of law to the plaintiffs here, by the Circuit Court of Nicholas County and was in violation of the Fourteenth Amendment to the Constitution of the United States.

> "The judgment of a court which has once acquired jurisdiction is unassailable collaterally only when after acquiring jurisdiction it proceeds according to established modes governing the class to which the particular case belongs. When it transcends, in the extent and character of its judgment, the law applicable to it, its judgment is not erroneous, but void."
>
> Taylor on Due Process of Law, p. 333.

The case of Winston v. McVeigh, 93 U. S. 274, is an *in rem* action in which the premises in controversy had been seized. The owner thereof being a non-resident, process of monition and notice by publication issued by which persons in interest were warned to appear and make allegations in their behalf. The owner appeared by counsel and made answer which on motion was stricken from the file on the ground that the defendant was an alien enemy and had no *locus standi* in that forum. Thereupon the court condemned the property as forfeited, stating that the default of all persons had been duly entered. It was held that under the circumstances the property could not be so forfeited because the defendant was not allowed to appear and make answer. Justice Field speaking for the court sadi:

> "The position of the defendant's counsel is, that, as the proceeding for the confiscation of the prop-

erty was one *in rem*, the court, by seizure of the property, acquired jurisdiction to determine its liability to forfeiture and, consequently, had a right to decide all questions subsequently arising in the progress of the cause; and its decree, however erroneous, cannot, therefore, be collaterally assailed. In supposed support of this position, opinions of this court in several cases are cited, where similar language is used respecting the power of a court to pass upon questions arising after jurisdiction has attached. But the preliminary proposition of the counsel is not correct. The jurisdiction acquired by the court by seizure of the *res* was not to condemn the property without further proceedings. The physical seizure did not of itself establish the allegations of the libel, and could not, therefore, authorize the immediate forfeiture of the property seized. A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer. The seizure in a suit *in rem* only brings the property seized within the custody of the court, and informs the owner of that fact. The theory of the law is, that all property is in the possession of its owner, in person or by agent, and that its seizure will, therefore, operate to impart notice to him. Where notice is thus given, the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed. That right must be recognized and its exercise allowed, before the court can proceed beyond the seizure to judgment. The jurisdiction acquired by the seizure is not to pass upon the

question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges."

The court further says:

"The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it."

In the case of Hovey v. Elliott, 167 U. S. 409, it appeared that the trial court obtained jurisdiction of the defendant by proper process, but struck his answer from the files until he should purge himself of contempt. This the defendant failed to do, and the court suppressing his testimony rendered judgment against him. It was held that this judgment was void and could be attacked collaterally. In the opinion cited, the court quoted with approval a definition of "due process" from the Dartmouth College case, which is as follows:

"A law which hears before it condemns, which proceeds upon inquiry and renders judgments *only after trial.* The definition here given is apt and suitable as applied to judicial proceedings which cannot be valid unless they 'proceed upon inquiry' and 'render judgment only after trial.'"

In the Elliott case the court further said:

> "* * * if the whole process of the court be spent, and the defendant never appears, you can never have a decree, for you can never make any proofs against an absent person who is never brought into contest, and there is no foundation for a decree without confession or proofs."

The case of Parsons v. Russell (1863, Mich.), 83 Am. Dec. 728, involved a statute of the State of Michigan which undertook to provide for a seizure and sale of certain property without proof establishing such claim before a judicial tribunal, and in the case cited such statute was held unconstitutional and as being in conflict with the 'due process of law' provision of the Constitution of the United States. Upon the subject at hand the court in the case just cited uses the following language:

> "This law confers upon a claimant a right to condemn and sell the boat upon his mere assertion of the debt without requiring proof to be made before any judicial tribunal or requiring any judgment to be made after trial or investigation of the demand. Thus a vessel may be sold upon the assertion of the existence of a demand which may be absolutely false and unfounded. He is deprived of his property before trial and judgment. Before property is taken from an individual he is entitled to trial according to the forms of law. Judicial action is, in such cases, imperatively required, and implies and includes *actor, reus, judex*—regular allegations, opportunity to answer and trial according to some settled course of judicial proceedings. And by this is meant an impartial judicial authority after a trial and judgment under general laws."

In the same opinion the court says that to permit a claimant to seize property and have it condemned and sold without proof is tantamount to permitting a person to be the judge in his own case.

The case at bar is very much like the case of Remer v. MacKay, 35 Fed. 86. In that case Remer was indebted to MacKay, and both were citizens of Illinois. Remer's wife obtained title to land in Iowa, and MacKay sued Remer and wife in Iowa by substituted service. The Iowa state court, having determined the allegations of the complaint to be true, rendered judgment directing the sale of the land, which was accordingly sold and conveyed to the purchaser MacKay. Remer, the plaintiff, later purchased the Iowa land from his wife and brought his action in the United States court to set aside the deed to MacKay. The court said:

> "The case made by the bill is not that of two conflicting titles, but that the defendant has attempted to divest Mrs. Remer of her title by judicial proceeding which is void. Under the showing made by this bill the Iowa state court had no jurisdiction over Mrs. Remer in the suit, and its judgment and proceedings did not operate to divest her of her interest in this property. I know of no judicial proceeding where the apparent owner of property can have his title divested and his property applied to the payment of another's debt without personal jurisdiction. This question has been frequently passed upon by the Supreme Court of the United States. Pennoyer v. Neff, 95 U. S. 714. * * * Mrs. Remer, under the line of authorities I have cited, could not be divested of her title without personal service, and having her day in court for the purpose of contesting the question as to whether she

held that in trust or in fraud of the creditors of Adam Remer. Therefore, I have no hesitation in saying that on the case made by the bill, while this debt may be a cloud on the title of Mrs. Remer to the property, she has not been divested of her estate."

In our opinion the point of the absence of proof raised in this case is within the doctrine laid down in many criminal cases where discharges are sought upon writs of habeas corpus for lack of proof before committees and magistrates. It has been held that if the committing magistrate has committed one charged with an offense without hearing any evidence at all, habeas corpus may be resorted to to discharge him, while if a committing magistrate has heard any competent evidence upon the question the court will not inquire into its sufficiency, the theory being that the jurisdiction of the committing magistrate depends upon the existence of competent evidence and presentation of it at the hearing. See *Ex Parte* Samuel, 82 W. Va. 486, and Hyde v. Shine, 199 U. S. 62-84. Of course it is well established, as is indicated in these opinions, that on a writ of habeas corpus if the committing authority has jurisdiction of the offense the accused will not be discharged for mere irregularities in the procedure; but there must not only be jurisdiction of the offense and of the person, but in order to commit for the offense there must be a showing that the offense has been committed. There can not be a commitment without such showing. And so in a case like this, the court must not only have jurisdiction of the cause of action, but it must do those things which are required in order to the entry of a final decree. It can no more enter a decree *pro confesso* in a cause where the defendants are not served with process than it can enter such a decree in a

cause of which it never acquired any jurisdiction in any form. It may have jurisdiction of the cause for the purpose of doing those things necessary to its proper adjudication, but unless it does those things necessary to the proper determination of the cause it cannot enter a decree determining it, for the doing of those things is as much necessary to confer jurisdiction to enter a final decree as the order of publication is in the first instance.

## CONCLUSION.

It is confidently and respectfully submitted that due process of law has been denied to these plaintiffs; that the substituted service seeking to bring these parties before the court in the case in the Circuit Court of Nicholas County was so defective that that court did not acquire jurisdiction to hear the plaintiffs' cause; and that even after assuming jurisdiction, that court did not hear the cause in a proper sense; in that case the plaintiff's allegations of fraud could not be taken for confessed, there being absolutely no proof and no evidence sustaining such charge, no case was made out against the defendants, and there was no trial or hearing; and for these reasons and other reasons appearing from the record the bill of these plaintiffs should not have been dismissed by the Judge of the District Court for the Southern District of West Virginia; and therefore, his order so dismissing the same should be reversed.

Respectfully submitted,

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LON H. KELLY,
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Of Counsel.

Harold A. Ritz

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1924 1925

No. 381 58

JOHN W. STEPHENSON, EMMA THOMSON, JENNIE STEPHENSON, MARY S. WEIMER, and W. B. STEPHENSON, *Appellants,*

*vs.*

H. L. KIRTLEY, H. W. HEROLD and F. E. CAWLEY, *Appellees.*

*APPEALED FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.*

REPLY BRIEF ON BEHALF OF APPELLANTS.

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LOVETT PRINTING CO., LAW PRINTERS, CHARLESTON, W. VA.

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## Reply Brief on Behalf of Appellants.

Replying as briefly as may be to the brief filed on behalf of H. L. Kirtley and H. W. Herold, two of the ap-

pellees, counsel for appellants beg leave to submit the following.

We cannot agree with the statement of opposing counsel that there are any errors of commission in the statement of facts as they appear in our original brief, although it may be that there are some errors of omission; but as the facts alleged in Appellants' bill filed in the United States District Court are taken as true upon the motion to dismiss, reference to that bill is here made for a full statement of the facts in so far as they are pertinent to the issues here raised.

It is respectfully submitted that opposing counsel seek to attach undue weight to the recitals contained in the decree of the Circuit Court of Nicholas County. In this particular case and in any case where defendants are proceeded against as non-residents, by substituted service, the recitals in the decree entered are not conclusive; and in support of this proposition the following authorities are cited.

The case of Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959, is a leading and well considered case upon this particular subject and other kindred questions involved in this cause, and from it we cite the following:

> "In a court of general jurisdiction, acting within the scope of its general powers, when jurisdiction of the subject-matter exists and appears, jurisdiction of the person will be presumed when the record is silent as to the latter, but such presumption will be limited to persons within its territorial limits."
>
> "Where the record states facts showing that a defendant is without the territorial limits of the

court, and that he never appeared in the action, presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree."

"When, by law of a State, constructive service of process by publication is substituted in place of personal citation against the person of an absent party, not a citizen of the State nor found within it, a strict and literal compliance with the statutory provisions is necessary.

"In proceedings had under special statutory authority, where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record."

This was a case in which the Circuit Court of the United States for the District of California was reversed and wherein the Circuit Court stated the rule of collateral attack upon the decree of the State court in the following language:

"When attacked collaterally it is not enough that the record does not affirmatively show jurisdiction, but, on the contrary, it must affirmatively show that the court did not have jurisdiction, or

the decree will be valid until reversed on appeal, or vacated on some direct proceeding taken for that purpose."

Mr. Justice Field, speaking for the Supreme Court of the United States, says, as to this pronouncement by the Circuit Court:

"But the rule of law as stated by the circuit court is not universally true. It is subject to many exceptions and qualifications, and has no application to the case at bar. * * *

"The presumptions indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits, persons who can be reached by their process, and also over proceedings which are in accordance with the course of the common law."

"Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was, at the time of the alleged service, without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree. This is so obvious a principle, and its observance is so essential to the protection of parties without the territorial jurisdiction of a court, that we should not have felt disposed to dwell upon it at any length, had it not been

impugned and denied by the circuit court. It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.

When, therefore, by legislation of a State, constructive service of process by publication is substituted in place of personal citation, and the court upon such service is authorized to proceed against the person of an absent party, not a citizen of the State nor found within it, every principle of justice exacts a strict and literal compliance with the statutory provisions. And such has been the ruling, we believe, of the courts of every State in the Union. It has been so held by the Supreme Court of California in repeated instances. In Jordan v. Giblin, 12 Cal., 100, decided in 1859, service of publication was attempted, and the court said that it had already held, 'in proceedings of this character, where service is attempted in modes different from the course of the common law, that the statute must be strictly pursued to give jurisdiction. A contrary course would encourage fraud and lead to oppression.' In Ricketson v. Richardson, 26 Cal., 149, decided in 1864, the court, referring to the sections of the statute authorizing service by publication, said: 'These sections are in derogation of

the common law, and must be strictly pursued in order to give the court jurisdiction over the person of the defendant. A failure to comply with the rule there prescribed in any particular is fatal where it is not cured by an appearance." * * *

"If jurisdiction of the person of the defendant is to be acquired by publication of the summons in lieu of personal service, the mode prescribed must be strictly pursued." * * *

" 'However high the authority to whom a special statutory power is delegated,' says Mr. Justice Coleridge, of the Queen's Bench, 'we must take care that in the exercise of it the facts giving jurisdiction plainly appear, and that the terms of the statute are complied with.' "

" 'A court of general jurisdiction,' says the Supreme Court of New Hampshire, 'may have special and summary powers, wholly derived from statutes, not exercised according to the course of the common law, and which do not belong to it as a court of general jurisdiction. In such cases, its decisions must be regarded and treated like those of courts of limited and special jurisdiction. The jurisdiction in such cases, both as to the subject matter of the judgment, and as to the persons to be affected by it, must appear by the record; and everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it. Morse v. Presby, 5 Fost. 302.

"The qualification here made that the special powers conferred are not exercised according to the course of the common law, is important. When

the special powers conferred are brought into action according to the course of that law, that is, in the usual form of common law and chancery proceedings, by regular process and personal service, where a personal judgment or decree is asked, or by seizure or attachment of the property where a judgment *in rem* is sought, the same presumption of jurisdiction will usually attend the judgments of the court as in cases falling within its general powers. Such is the purport of the language and decision of this court in Harvey v. Tyler, 2 Wall. 332 (69 U. S. XVII., 871). But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record." * * *

"In the supplemental complaint filed in the action of Gray v. Eaton and others, and in the original complaint of Eaton v. Palmer, the absence of Franklina from the State and her residence in another State are alleged. The record in the two actions, and of course in the consolidated action, shows that she was thus beyond the reach of the process of the court. All presumption of jurisdiction over her person by the district court, which otherwise might have been indulged, is thus repelled, and it remains for the defendant to show that by the means provided by statute such jurisdiction

was obtained. The statute provides, in case of absent and non-resident defendants, for constructive service of process by publication. It requires an order of the court or judge before such publication can be made; it designates the facts which must exist to authorize the order, the manner in which such facts must be made to appear, the period for which publication must be had, and the mode in which the publication must be established. These provisions, as already stated, must be strictly pursued, for the statute is in derogation of the common law. And the order, which is the sole authority for the publication, and which by statute must prescribe the period and designate the paper in which the publication is to be made, should appear in the record with proof of compliance with its directions, unless its absence is supplied by proper averment. If there is any different course of decision in the State it could hardly be expected that it would be followed by a Federal Court, so as to cut off the right of a citizen of another State from showing that the provisions of law, by which judgment has been obtained against him, have never been pursued."

We cite also the case of Cooper v. Newell, 173 U. S. p. 555, 43 L. Ed. 808, 812, 813. The question involved in this case is whether the judgment entered by a court of Brazoria County, Texas, in favor of one McGrael against Newell was open to attack in the Circuit Court of the United States for the Eastern District of Texas.

"When a judgment of a state court comes under consideration in a court of the United States sit-

ting in the same state, the question of jurisdiction of the state court to render the judgment is open to inquiry in the United States court."

"In such case, evidence is admissible to contradict the recital in the judgment that defendant was a citizen and resident of the state, and to show that he was not served with process and that the attorney who appeared for him had no authority to represent him."

"In Thompson v. Whitman, 18 Wall. 457, a leading case in this court, it was ruled that 'neither the constitutional provision that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered;' that 'the record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, *notwithstanding it may recite that they did exist*;' and that 'want of jurisdiction may be shown either as to the subject-matter or the person, or, in proceedings *in rem,* as to the thing.'" * * *

"And so in New York, when a judgment of a court of that state was drawn in question, which had been entered against a non-resident, who was not, during the pendency of the proceedings, within the jurisdiction of the state. Vilas v. Plattsburgh & Montreal Railroad Company, 123 N. Y.

440. There the rule that domestic judgments against a party not served, but for whom an attorney appeared without authority, cannot be attacked collaterally, was adhered to; yet the court of appeals declined to apply it to a case where the defendant was a non-resident and not within the jurisdiction during the pendency of the proceedings, such judgments being held to be not strictly domestic but to fall within the principle applicable to judgments of the courts of other states, in respect of which Andrews, J., delivering the opinion of the court said: 'It is well settled that in an action brought in our courts on a judgment of a court of a sister state the jurisdiction of the court to render the judgment may be assailed by proof that the defendant was not served and did not appear in the action, or where an appearance was entered by an attorney, that the appearance was unauthorized, and this even where the proof directly contradicts the record.' "

"We think the circuit court was clearly right in admitting evidence to contradict the recital that Newell was a citizen and resident of Texas, and to show that the attorney had no authority to represent him."

In the case of Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897, the question of recitals in a judgment or decree was fully examined in the light of the authorities. Mr. Justice Bradley, speaking for the court and delivering its unanimous judgment, stated the conclusion to be clear that the jurisdiction of a court rendering judgment in one State may be questioned in a collateral proceeding

in another State or in a proper court of the United States, notwithstanding the averment in the record of the judgment itself. From that opinion we quote the following:

> "But it must be admitted that no decision has ever been made on the precise point involved in the case before us, in which evidence was admitted to contradict the record as to jurisdictional facts asserted therein, and especially as to facts stated to have been passed upon by the court.
>
> But if it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done no statements contained therein have any force. If any such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed, which avail nothing if the instrument is shown to be fraudulent. The records of the domestic tribunals of England and some of the States, it is true, are held to import absolute verity as well in relation to jurisdictional as to other facts, in all collateral proceedings. Public policy and the dignity of the courts are supposed to require that no averment shall be admitted to contradict the record. But, as we have seen, that rule has no extraterritorial force."

The case of Empire Ranch & Cattle Co. v. Coldren, 51 Colo. 124, 117 Pac. 1008, holds void on collateral attack a judgment against a non-resident where the record showed defective affidavit for publication.

The case of Duval v. Johnson, 90 Neb. 505, 133 N. W. 1126, holds that a recital in the judgment foreclosing a tax lien, that due and regular notice of the pendency of the action had been given the defendants, did not supply jurisdictional facts.

Gould v. Jacobson, 58 Mich. 293, 25 N. W. 197, holds that mere recital of due publication and return cannot cure want of it.

IN CONCLUSION we respectfully insist that the recitals in the decree in the instant case, which purport to confer jurisdiction or justify the exercise of jurisdiction, when such recitals are attacked in a proper United States Court, are without force or effect.

Respectfully submitted,

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Attorneys for Appellants,

LON H. KELLY,
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Of Counsel.

IN THE

# Supreme Court of the United States

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BRIEF ON BEHALF OF H. L. KIRTLEY AND H. W. HEROLD, TWO OF THE APPELLEES.

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H. W. Herold, two of the Appellees.

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# INDEX

## CITATIONS.

IN THE

# Supreme Court of the United States

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---------- TERM, 1925.

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## No. 381

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JOHN W. STEPHENSON, EMMA THOMSON, JENNIE STEPHENSON, MARY S. WEIMER, and W. B. STEPHENSON, *Appellants,*

*vs.*

H. L. KIRTLEY, H. W. HEROLD and F. E. CAWLEY, *Appellees.*

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*APPEALED FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.*

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BRIEF ON BEHALF OF H. L. KIRTLEY AND H. W. HEROLD, TWO OF THE APPELLEES.

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### STATEMENT OF FACTS.

An examination of appellants' brief shows several errors of commission and omission in stating the facts which are important to a correct understanding of the case and a decision of the points involved, and we, therefore, think it well to set out herein a brief reply to the statement of facts, elaborating on certain matters neces-

sary to an understanding of the case, correcting errors referred to and supplying facts omitted from appellants' statement.

It is true, as stated in appellants' brief, that this is a suit in equity instituted in the District Court of the United States for the Southern District of West Virginia, as set out in said statement, and that the object and purpose is to have set aside certain decrees of the Circuit Court of Nicholas County and a deed. We think it well at this point to make it clear the nature of the suit in the Circuit Court of Nicholas County and the proceedings had therein in order that the true situation respecting these two suits, independent in their nature, subject and inception, may be clearly understood.

The suit referred to as being brought in the Circuit Court of Nicholas County was also a suit in chancery. The same was brought by F. E. Cawley, a co-defendant with the appellees represented in this brief. Said suit was to recover on certain foreign judgments held by said Cawley against said W. B. Stephenson and others and was based upon an attachment sued out in said suit and levied on the interest of W. B. Stephenson in certain real estate in said County, and in addition to seeking to have said judgments enforced and said real estate sold to satisfy same said bill also asked to have set aside certain deeds made by said W. B. Stephenson to others as being voluntary conveyances, fraudulent as to creditors under the law of West Virginia, etc. All of the defendants named in said bill, afterwards plaintiffs in the suit now before this Court were non-residents and were proceeded against by order of publication. The Circuit Court of Nicholas County affirmatively held that "the order of publication duly executed as to the defendants

who are non-residents and have been regularly proceeded against as such" (R. 36). It will be noted that the decree quoted from above is brought on further "upon the bill and its exhibits duly filed at rules, the *decree nisi* properly taken thereon and regularly set for hearing by the plaintiff; upon the affidavit filed herein for an attachment; upon the attachment issued herein, the levy thereof and return thereon made by the officer levying the same; and upon the arguments of counsel", etc. (R. 36). The decree then finds judgment in favor of the plaintiff against said W. B. Stephenson for $34,285.60, with interest from the date of the decree until paid. The decree then, continuing, says:

> "And it further appearing to the satisfaction of the Court *from the papers and evidence in this case* that the said deed from W. B. Stephenson and Sarah Stevenson, his wife, to John W. Stevenson, Emma S. Thomson, Jennie Stephenson and Mary S. Weimer, bearing date the 26th day of February, 1908, conveying to John W. Stephenson three-twelfths of a one-fourth undivided interest, to the said Emma Thomson three-twelfths of a one-fourth undivided interest, to the said Jennie Stephenson one-sixth of an undivided one-fourth interest, and to the said Mary S. Weimer one-sixth of an undivided one-fourth interest in the several tracts of land described in said deed and the deed from W. B. Stephenson and Sarah W. Stephenson, his wife to Emma S. Thomson, bearing date on the 12th day of January, 1911, conveying the one-twenty-fourth interest in the lands therein described, were made to hinder, delay and defraud the creditors of the said W. B. Stephenson, and especially the plaintiff,

F. E. Cawley, in respect to the debt and demand herein adjudged to said plaintiff, it is therefore further adjudged, ordered and decreed that the said deeds, bearing date as aforesaid, be and the same are hereby set aside and held for naught, but so far only as the said debt and demand of said plaintiff, F. E. Cawley, is concerned." (R. 36.)

(Italics are ours.)

The same decree, continuing, says:

"And it further appearing to the Court that this is a proceeding by order of publication and attachment of the property of the said defendant found in this County, without any personal service on the said defendants, and the said defendants not having entered their appearance in this action, the Court doth not enter any personal decree against the said W. B. Stephenson; but doth find and doth adjudge, order and decree that the property of the said defendant, W. B. Stephenson, levied on of said attachment is liable to the payment of the said sum of $34,285.60, with interest thereon from this date until paid, and the costs of this suit and attachment issued herein."

The decree then finds that said attachment had been levied on certain real estate, which is the same real estate set out in appellants' bill and the exhibits therewith, said real estate being fully described in said decree.

The decree then further recites:

"All the above described property belonging to the said defendant, W. B. Stephenson, and having

> been levied on to satisfy the plaintiff's said debt and demand; and it appearing to the satisfaction of the Court that the property is still under the levy of said attachment and is liable to the payment of said debt and claim of the plaintiff, it is therefore adjudged, ordered and decreed that the said W. B. Stephenson do pay unto the said F. E. Cawley within thirty days from the rising of this court the said sum of $34,285.60, with legal interest", etc., * * * * "and in default thereof the said property, or so much thereof as may be necessary to be sold to pay the plaintiff's said debt and interest thereon", etc. (R. 38.)

The decree then proceeds to appoint special commissioners to make sale of said real estate in case of default, prescribes the terms and conditions of sale, requires that bond be given by said special commissioners before making sale, and in addition thereto requires that a further bond shall be given by the plaintiff. The provision in said decree respecting such further bond is as follows:

> "And it is further adjudged, ordered and decreed that before said sale be made, the said plaintiff or someone for him, shall give bond with sufficient security before the Clerk of this Court in the penalty of $30,000.00, conditioned that the plaintiff will perform such future order as may be made by the Court in this suit in case the said defendants shall hereafter appear and make defense herein within the time prescribed by law". (R. 39).

At this point it is well to state that the plaintiff did

give the $30,000.00 bond required, which bond, after being kept in full force and effect for the time prescribed by law, was, no appearance having been made by the defendants, finally discharged (R. 41, 43).

Said real estate was duly sold by the commissioners appointed for that purpose, the sale confirmed, purchase money all paid, and deed executed to the purchasers (H. L. Kirtley and H. W. Herold, appellees herein), said deed recorded, and said cause finally ended, including the discharge of plaintiff's bond as aforesaid and stricken from the docket.

At no time did the defendants, or any of the defendants, make any appearance or make any attempt to appeal said cause, nor did they file a petition for review or take any action which might have been taken to have the action of the Circuit Court of Nicholas County reviewed or passed upon on appeal.

The real estate in question sold for more than the plaintiff's debt and interest, costs of suit, costs of attachment, etc., and the surplus was reported to the Court and deposited under the direction of the Court, and we presume is still on deposit. (R. 44.)

The sale of said real estate was made on the 18th day of May, 1921, (R. 39), was confirmed at the May Term, 1921, although the record while setting out the decree of confirmance, fails to give the date of its entrance (R. 41-42). A deed was executed by said commissioners dated the 18th day of May, 1923 (R. 78). All of the purchase money would have been paid sooner and deed executed except for the loss of the purchase money notes given by appellee, Kirtley and Herold, whereby said purchasers refused to pay the balance of the purchase money until the notes were delivered cancelled or pro-

vided for by a decree of the Circuit Court, which was done. (R. 43.)

It will be noted that this suit in the District Court of the United States was instituted July 2, 1923, more than two years after the sale of the real estate (R. 39); more than three years after the institution of said chancery cause in the Circuit Court of Nicholas County (R. 26) and several months after the execution and recording of the deed to appellees (R. 78), and approximately two months after the discharge of the plaintiff's bond (R. 43).

The further statement of appellees that they own certain undivided interests of the undivided interest of W. B. Stephenson and that same was purchased by W. B. Stephenson "with funds belonging to himself and his five brothers and sisters" may of necessity and as a matter of law be taken as true on the pleadings, the District Court in this case having sustained a motion to dismiss plaintiff's bill, but if such statement in fact is true, then such fact was not known to appellees and contrary to the finding of the Circuit Court of Nicholas County. The same is true as to the further recitals of the transactions between said Stephenson and his brothers and sisters as set out in appellants' statement.

Appellants say that "shortly after W. B. Stephenson so took title in his own name, he, on December 3, 1902, executed and delivered to his said brothers and sisters named above a declaration of trust, which discloses the uses for which he held such title and the real interests of the plaintiffs as the same were then held and as herein stated". But appellants fail to state that said declaration of trust was never recorded in the County Court Clerk's office of Nicholas County, and was not a matter

of record at the time of the proceedings in the Circuit Court of Nicholas County, and that these appellees had no notice, either constructive or actual, of the existence of such a paper, if the same did in fact exist.

The further statements as to the transactions of the appellants amongst themselves as to their residence and as to a certain action in the Court of Common Pleas of Clearfield County, Pennsylvania, are all based upon the allegations in the appellants' bill, such allegations not being sustained by any evidence, as no proof has been taken on the bill in this cause. Appellees, however, are aware of the fact that upon the motion to dismiss the material allegations of the plaintiffs' bill in this cause are taken as true.

Appellants' statement then takes up certain questions respecting the suit in the Circuit Court of Nicholas County and says: "The order of publication in the caption thereof and in styling the case contains the name of Emma Thomas as a defendant, instead of Emma Thomson, which was doubtless intended". This is true as to the caption only of the order, Emma Thomson being correctly described in the order itself and being the person required to appear in response to said publication. It has been said and is stated by the appellants that all of the other parties named in the order of publication are brothers and sisters, and, therefore, Emma Thomson could not possibly be prejudiced by the wrong designation in the caption, as she, no doubt, was notified by her brothers and sisters, and it has been seen she was ordered to appear in her proper name in the body of the order.

Appellants in their statement next say "There is no evidence in the record of the posting of the order of publication". While this is true, the Court's attention is

called to the fact that there is no evidence that the same was not posted, and it will be hereinafter shown that under the law of West Virginia there is a presumption of law that it was duly posted. The attention of the Court is also called to the fact that the Circuit Court of Nicholas County affirmatively found that the order of publication had been duly executed (R. 36). As a matter of fact the notice was posted as well as published, notwithstanding the record's silence on this point. We know of no provision for making the posting a matter of record, and it seems that the several Circuit Courts of West Virginia have different rules as to proof of such posting, etc. This matter, however, is amply taken care of in the presumption referred to.

Appellees deny the statement that "the affidavit for the order of attachment is insufficient; and the order of attachment does not direct or authorize its levy upon the property or estate of either of the plaintiffs, who then owned and held the title to said interest in said lands; but directs the attaching of the estate of plaintiff, W. B. Stephenson, who had been before that time divested of all right or title to the lands in question", but maintain that the affidavit is proper and sufficient and in accordance with the law of West Virginia, and while the affidavit is properly directed against the real estate of W. B. Stephson, the judgment debtor of plaintiff, and while said real estate was attached as his property, the Circuit Court of Nicholas County upon the hearing of said chancery cause set aside the deeds made by W. B. Stephenson as heretofore set out, held that said real estate was the property of W. B. Stephenson, held that the order of attachment was levied on the identical real estate which was sold, and also held that the same belonged to W. B. Steph-

enson and had been levied on to satisfy the plaintiff's debt and demand and that at the time of directing sale "the property is still under the levy of said attachment and is liable to the payment of said debt and claim of plaintiff". (R. 36, 37, 38).

Appellees' statement next says, "A decree (R. 36) was rendered in said cause by the Judge of the Circuit Court of Nicholas County upon the bill and exhibits alone and without evidence touching the allegation of fraud", etc. While appellees contend that if such statement were a fact it could be only taken advantage of on appeal, nevertheless the decree referred to shows such statement to not be a fact, because the decree says, "And it further appearing to the satisfaction of the Court from the papers and evidence in this case that the said deed from W. B. Stephenson * * * * were made to hinder, delay and defraud the creditors of the said W. B. Stephenson, and especially the plaintiff, F. E. Cawley". (R. 36).

At this point we will also call the attention of the Court to the fact that the plaintiff's bill in the Circuit Court of Nicholas County was sustained by exhibits of the transcripts of the judgments of the plaintiff, Cawley, showing the dates of the institution of the suits and rendition of judgments, and the date of the execution of the notes on which said judgments were predicated and copies of the deeds from the defendant, W. B. Stephenson, to his brothers and sisters were likewise exhibited, and the Court, in addition to other evidence, no doubt took into consideration the fact that said deeds were made to the brothers and sisters, as to one deed about the time of the execution of the notes, and as to the other deed about the time of the institution of suit on the notes in the State of Pennsylvania. The notes were dated Feb-

ruary 7, 1908. The deed from W. B. Stephenson to John W. Stephenson and others was dated February 26, 1908. The first suit of Cawley instituted in Pennsylvania was in February, 1911, and the deed of W. B. Stephenson to Emma S. Thomson was dated January 12, 1911. Appellees contend, however, that the question as to the amount and character of the evidence before the Circuit Court of Nicholas County is not subject to attack in this suit, as will be hereafter shown.

The statement in appellants' brief that "the plaintiffs here had no knowledge of the suit in the Circuit Court of Nicholas County or of the proceedings had therein, until more than two years after the entry of the final decree of sale and the decree of confirmation" is strenuously denied, as appellees are in position, we believe, to affirmatively prove that at least a portion, if not all, of the appellants had actual knowledge of the chancery cause in Nicholas County before the expiration of two years, but we do not see where this matter can be considered in this cause. The law of West Virginia allows two years in which defendants proceeded against by order of publication, as in the cause in the Circuit Court of Nicholas County, can appear and defend their rights, and such limit is based upon constructive knowledge, and not actual knowledge.

It is, of course, true that this suit was instituted in the District Court of the United States for the Southern District of West Virginia in July, 1923, more than two years after the final ending of the suit in the Circuit Court of Nicholas County, and that this suit is an independent suit brought for the purpose of declaring absolutely void all of the proceedings had by the Circuit Court of Nicholas County.

In conclusion, that while many of the details of the chancery cause in Nicholas County and of this suit subsequently brought have been set forth at least in appellants' statement and in this reply, nevertheless the one point to be determined and, in our opinion, the only pertinent point, is whether the Circuit Court of Nicholas County acquired jurisdiction of the subject matter of said suit and if found affirmatively, as we believe it will be so found, then all other questions raised by appellants are of no avail in this suit, because while they might have been taken advantage of upon an appeal of the chancery cause in Nicholas County, they can not be now considered collaterally by this Court.

## STATUTES.

In addition to the statutes quoted by appellants, we feel that the following statutes of West Virginia have or may have some application to the questions in this cause and are, therefore, quoted for the benefit of the Court.

Section 1, chapter 74 Barnes' Code:

> "Acts void as to creditors; *bona fide* purchasers. —Every gift, conveyance, assignment, or transfer of, or charge upon, any estate, real or personal, every suit commenced, or decree, judgment, or execution suffered or obtained, and every bond or other writing given, with intent to delay, hinder, or defraud creditors, purchasers, or other persons, of or from what they are or may be lawfully entitled to, shall as to such creditors, purchasers, or other persons, their representatives or assigns, be

void. This section shall not affect the title of a purchaser for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

Sec. 2, chapter 133 Barnes' Code:

"Suits to annual fraudulent transfers; relief.—A creditor, before obtaining a judgment or decree for his claim, may institute any suit to avoid a gift, conveyance, assignment, or transfer of, or charge upon, the estate of his debtor, which he might institute after obtaining such judgment or decree, and he may in such suit have all the relief in respect to said estate, which he would be entitled to after obtaining a judgment or decree for the claim which he may be entitled to recover."

Sec. 1, chapter 123 Barnes' Code:

"Venue in general.—Any action at law or suit in equity, may hereafter be brought in the circuit court of any county: (1) Wherein any of the defendants may reside, except that an action of ejectment or unlawful detainer must be brought in the county wherein the land sought to be recovered or some part thereof is; or (2) if a corporation be a defendant wherein its principal is, or wherein its mayor, president or other chief officer resides; or if its principal office be not in this state, and its mayor, president, or other chief officer do not reside therein, wherein it does business; or (3) if it be to recover land or subject it

to a debt wherein such land or any part thereof may be; or (4) if it be against a non-resident of the state wherein he may be found, or may have estate or debts due him; * * * *."

Sec. 11, chapter 124 Barnes' Code:

"Service by publication.—On affidavit that a defendant is not a resident of this state; or that diligence has been used by or on behalf of the plaintiff to ascertain in what county he is, without effect; or that process, directed to the officer of the county in which he resides or is, has been twice delivered to such officer more than ten days before the return day, and returned without being executed; or that the defendant is a corporation, and that no person can be found in the county upon whom the process can be legally served, an order of publication may be entered against such defendant. And in any suit in equity, where the bill states that the names of any persons interested in the subject matter to be divided or disposed of are unknown, and makes such persons defendants by the general description of parties unknown, on affidavit of the fact that the said names are unknown, an order of publication may be entered against such unknown parties. Any order under this section may be entered either in court or at rules. In a proceeding by petition, there may be an order of publication in like manner as in a suit in equity."

Sec. 1, chapter 106 Barnes' Code:

"Grounds; affidavit; order by clerk; execution

of writ; attachment in equity; debts not due; foreign corporations; non-residents.—When any action at law or suit in equity is about to be or is instituted for the recovery of any claim or debt arising out of contract, or to recover damages for any wrong, the plaintiff at the commencement of the action or suit, or at any time thereafter and before judgment, may have an order of attachment against the property of the defendant, on filing with the clerk of the court in which such action or suit is about to be or is brought, his own affidavit or that of some credible person, stating that the nature of the plaintiff's claim and the amount, at the least, which the affiant believes the plaintiff is justly entitled to recover in the action or suit, and also that the affiant believes that some one or more of the following grounds exist for such attachment: (1) That the defendant, or one of the defendants, is a foreign corporation, or is a non-resident of this state", * * * * * * * * *

The order shall be issued by the clerk, and may be in form or effect as follows:

'A____B____, Plaintiff, )
vs. : Order of Attachment.
C____D____, Defendant. )

The plaintiff in this case having filed his affidavit as required by law, the sheriff of the county of --------, or constable of any district therein, to whom this order may come, is required, in the name of the state of West Virginia, to attach the estate of the defendant, C_____ D_____, sufficient to pay the sum of -------- (the amount the affiant states the plaintiff is justly entitled to re-

cover) and the costs of this suit, and make return of his proceedings under this order to the next term of the _____ court (or at rules to be held for the _____ court on the __ day of _____, naming in either case the court in which the action is brought).

Witness E_____ F_____, clerk of said court, this ____ day of _____.

E_____ F_____, Clerk.'

And such attachment may be sued out in a court of equity for a debt or claim, legal or equitable, whether the same be due or not upon any of the grounds aforesaid, but the affidavit in case the claim or debt be not due, must show when it will become due: Provided, That an attachment shall not be sued out against a foreign corporation, nor against a non-resident defendant for a debt not due, unless the affiant shows by his affidavit that such defendant was a resident of this state when the debt was contracted, and that the plaintiff believed he would remain a resident of this state at the time he gave the defendant credit."

Sec. 7, chapter 106 Barnes' Code:

"Return of officer; description of property.—The officer serving the attachment shall make return of the time and manner of service on each person designated as being indebted to, or having in his possession, the property of any such defendant; and shall also return a list and description of the property taken (if any) under such attach-

ment, and likewise the date of the service, or execution thereof on each person and parcel of property."

Sec. 9, chapter 106 Barnes' Code:

"Lien of attachment.—The plaintiff shall have a lien, from the time of the levying of such attachment, or serving a copy thereof, as aforesaid, upon the personal property, choses in action, and other securities of the defendant against whom the claim is, in the hands of, or due from any such garnishee, on whom it is so served, and on any real estate levied on by virtue thereof, from the suing out of the same. But if no bond be given by the plaintiff, and such personal property, choses in action, or other securities of the defendant, or any part thereof, be sold or disposed of for a valuable consideration, the lien or the attachment thereon shall cease and determine from the date of such sale or disposition."

Sec. 17, chapter 106 Barnes' Code:

"Order of publication.—When any attachment, except under the third section, is returned executed, an order, as prescribed in chapter one hundred and twenty-four, shall be made against the defendant against whom the claim is, unless he has been served with a copy of the attachment or with process in the suit in which the attachment issued."

Sec. 19, chapter 106 Barnes' Code:

"Contest of right to attachment; trial; judg-

ment on merits; costs.—The right to sue out an attachment may be contested, and when the court is of opinion that the facts stated in the affidavit were not sufficient to authorize the issuing thereof, or that the affidavit is otherwise insufficient, judgment shall be entered that the attachment be quashed. If the defendant desire to controvert the existence of the grounds for the attachment stated in the affidavit, he may file a plea in abatement denying the existence of such grounds, and the issue on such plea shall be tried by a jury, unless the same be waived by the parties. The affirmative of such issue shall be with the plaintiff; and if he fail to prove to the satisfaction of the jury, the existence of the grounds denied by the defendant, the verdict shall be for the defendant, and judgment shall be entered that the attachment be abated. But the court may grant new trials as in other cases. When the attachment is properly sued out, and the case heard upon its merits, if the court be of opinion that the claim of the plaintiff is not established, final judgment shall be given for the defendant. In either case the defendant shall recover his costs, and there shall be an order for the restoration to him of the attached effects."

Sec. 20, Chapter 106 Barnes' Code:

"Order of sale.—If the claim of the plaintiff in any suit or proceeding under this chapter be established, judgment or decree shall be rendered for him, and the court shall order the sale of any real estate levied upon under and by virtue of any

such attachment, which shall not have been previously sold or replevied under this chapter, and direct the proceeds of the sale of such property and whatever else the attachment has been levied upon, including what is embraced by such replevy or forthcoming bond, to be applied in satisfaction of said judgment or decree. But no real estate shall be sold under such order until all other property and money so levied on as aforesaid, has been exhausted, and then only so much thereof as is necessary to pay the judgment or decree."

Sec. 21, chapter 106 Barnes' Code:

"Attachment sale.—When a sale of real estate is so ordered, the court shall prescribe in the order the terms of such sale and the officer or person by whom it shall be made. The officer or person making such sale of real estate, shall report to the court which ordered the sale, the real estate so sold by him, with the name of the purchaser, the sum for which it sold, and the time and place of such sale. The court for good cause, may refuse to confirm the sale, and order the property to be resold; but if good cause for setting the sale aside be not shown, the court shall confirm the sale, and shall direct a deed of conveyance of the real estate so sold, to be made to the purchaser thereof, by the officer or person who sold the same, or by a special commissioner, appointed for that purpose, whenever the purchase money thereof, with its interest, shall have been fully paid. An officer heretofore or hereafter directed by the court to make such conveyance, may make the same in his of-

ficial character, notwithstanding his term of office shall have expired."

Sec. 22, Chapter 106 Barnes' Code:

"Bond for such sale.—But if the defendant whose real estate is attached has not appeared in the action or suit, or been served with a copy of the attachment sixty days before such judgment, decree, or order, no sale of the real estate so attached shall be made until the plaintiff or some one for him, shall give bond, with sufficient security, in such penalty as the court shall approve, with condition that the plaintiff will perform such future order as may be made by the court in the action or suit, in case the defendant appear and make defense therein within the time prescribed by law: Provided, That after the right of a defendant to appear and make defence in any such action or suit shall have expired by limitation or otherwise, as prescribed in this chapter, a sale of such real estate may be made under the judgment, order or decree, whether such bond has been given or not. If personal property be levied upon, and ordered to be sold, where there has been no such appearance or service of the attachment, as aforesaid and no bond has been given by the plaintiff as provided in section six of this chapter, the court shall require such bond to be given by the plaintiff, and if the plaintiff, or some one for him, fail to give such bond within a reasonable time, the court shall dispose of such property, or the proceeds thereof, as to it shall seem just."

Sec. 25, chapter 106 Barnes' Code:

"Rehearing, after judgment or decree on publication.—If a defendant against whom, on publication, judgment or decree has been or shall hereafter be rendered, in an action or suit in which an attachment has or may be sued out and levied as provided in this chapter, or his personal representatives, shall return to, or appear openly in this state, he may, within one year after a copy of such judgment or decree has been or shall be served upon him, at the instance of the plaintiff, or within two years from the date of such judgment or decree, if he be not so served, petition to have the proceedings reheard. On giving security for the costs which have accrued and shall thereafter accrue, such defendant shall be admitted to make defense against such judgment or decree, as if he had appeared in the case before the same was rendered, except that the title of any *bona fide* purchaser to any property, real or personal, sold under such attachment, shall not be brought in question or impeached. But this section shall not apply to any case in which the petitioner, or his decedent, was served with a copy of the attachment, or with process in the suit wherein it issued more than sixty days before the date of the judgment or decree, or to a case in which he appeared and made defense: Provided, that if such judgment or decree was made before this section as amended takes effect, such petition may be filed within the time prescribed by law at the time such judgment was rendered or decree pronounced."

Sec. 26, chapter 106 Barnes' Code.

"Proceedings on re-hearing or new trial.—On any re-hearing or new trial had under the preceding section of this chapter, if the judgment or decree be for the defendant, the court may order the plaintiff in the original suit or his personal representative, to restore any money paid him under his judgment or decree therein, with interest from the date of such order, to the defendant, or his personal representative, entitled thereto, and may enter a judgment or decree against him therefor; and if the defendant or his personal representative, fail to recover on such re-hearing or new trial, the original judgment or decree shall be confirmed; and in either case the costs shall be adjudged to the prevailing party."

Sec. 1, chapter 132 Barnes' Code:

"Decree or order for sale of property; terms; special commissioner or receiver.—A court in a suit, pending properly therein, may make a decree or order for the sale of property in any part of the state, and may direct the sale to be for cash, or on such credit and terms as it may deem best; and it may appoint a special commissioner or special receiver to make such sale."

Sec. 4, chapter 132 Barnes' Code:

"Execution of deed by commissioner.—A court of law or equity, in a suit in which it is proper to decree or order the execution of any deed or writing, may appoint a commissioner to execute the

same; and the execution thereof shall be as valid to pass, release, or extinguish the right, title, and interest of the party on whose behalf it is executed, as if such party had been at the time capable in law of executing the same and had executed it."

Sec. 8, chapter 132 Barnes' Code:

"Reversal of decree of sale; effect on title; restitution of proceeds.—If a sale of property be made under a decree or order of a court, and such sale be confirmed, though such decree or order be afterwards reversed or set aside, the title of the purchaser at such sale shall not be affected thereby; but there may be restitution of the proceeds of sale to those entitled."

Sec. 8a, chapter 132, Barnes' Code:

"Presumption or jurisdiction and regularity as to sales.—(1) When land or any interest in land in this state has heretofore been sold, partitioned or disposed of prior to the formation of this state, under the order, judgment or decree of any court of competent jurisdiction of the state of Virginia, or has heretofore been or shall hereafter be sold, partitioned or disposed of under the order, judgment or decree of any court of competent jurisdiction of this state, it shall be presumed, in the absence of evidence to the contrary, that every such court obtained jurisdiction in the cause by the institution of proper process over any and all persons whose names appear in any part of the record of the cause as persons embraced therein or against whom

the court proceeded, and this presumption shall apply to any person or persons named by the designation of child, children, heir-at-law, heirs-at-law, devisee, devisees, or other sufficient designation or classification from which it can be shown by the record or otherwise the person or persons included therein or intended thereby.

(2) When any deed has heretofore been made prior to the formation of this state for land or any interest in land therein, which purports on its face to be made under judicial proceedings of a court of the state of Virginia by a commissioner, special commissioner, guardian or other person, or when any deed has heretofore been made or shall hereafter be made for land or any interest in land in this state which purports on its face to be made by a commissioner, special commissioner, guardian or other person under the judicial proceedings of a court of this state, then in every such case it shall be presumed, in the absence of evidence to the contrary, that the person executing such deed was authorized by the court to convey the land or interest therein which is conveyed by such deed."

## APPELLANTS' ASSIGNMENT OF ERRORS.

Appellants in their brief make no specific assignment of errors, but we find an assignment of three errors in the record (R. 92).

As to the first, the appellees maintain that the United States District Court committed no error in sustaining the motion of defendants to dismiss the bill herein, but, on

the other hand, took the only possible action justified by the law and decisions applicable to this cause.

As to the second assignment, appellees contend that the United States District Court in this cause had no right to review the action of the Circuit Court of Nicholas County, but was restricted to the single question of the jurisdiction of the Circuit Court of Nicholas County, which jurisdiction was affirmatively found in favor of that Court. Appellees see no ground for the contention that appellants were denied due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The third assignment of error is practically covered by the first and second, except that it is contended that the action of the Circuit Court of Nicholas County was made "without hearing any evidence upon said question and without any service of process upon your petitioners or either of them." The decree of the Circuit Court of Nicholas County affirmatively states that the same was based on the evidence and the record discloses the bill filed, sustained by numerous exhibits, from which the similarity in dates as to the execution of notes, institution of suits, and the execution of the deeds as hereinbefore referred to in the statement, would at least raise a presumption of fraud. The affidavit for attachment also sets forth certain facts, duly verified. The record does not show that there was not other evidence before the Court which may have been given orally in open court or in chambers, while the decree itself affirmatively states that the same was rendered on the evidence. Appellees contend that the question of the amount and sufficiency of the evidence, or even of the evidence itself, is not a matter going to the jurisdiction, and therefore not a matter sub-

ject to collateral attack. If there was no evidence, the decrees of the Circuit Court of Nicholas County might be voidable, but if the Circuit Court of Nicholas County acquired jurisdiction under the order of publication and attachment, its decrees are not void.

The statement in the third assignment that the same was "without any service of process upon your petitioners or either of them" is not sustained by the record.

## STATEMENT OF THE POINTS OF LAW AND FACT PERTINENT TO THIS CAUSE.

**1. The Circuit Court of Nicholas County had jurisdiction:**

(a) *By order of publication independent of the attachment;*

(b) *By order of publication and attachment of the property sold to satisfy plaintiff's debt.*

**2. The Circuit Court having acquired jurisdiction, its decrees are not void but merely voidable:**

(a) *Advantage of errors can be taken only by appeal or appearance within the time allowed under the statute;*

(b) *Jurisdiction once acquired the action of the Circuit Court of Nicholas County is not subject to collateral attack;*

(c) *The United States District Court for the Southern District of West Virginia is a court of concurrent jurisdiction with the Circuit Court of Nicholas County, West Virginia, and has no appellate powers nor jurisdiction to review the action of the Circuit Court of Nicholas County.*

**3. Appellees, H. L. Kirtley and H. W. Herold, were not parties to the suit in the Circuit Court of Nicholas County, but merely purchasers of property under the decrees in that suit. That suit having finally ended before the institution of the suit in the United States District Court, there was no lis pendens as to them and their purchase became final:**

(a) *Said Kirtley and Herold in any event should be protected in their purchase;*

(b) *Any issues raised in the suit now pending and decrees thereon should be restricted to the fund arising from said sale, and should not be permitted to affect the title of appellees, Kirtley and Herold, at this time.*

**4. The point raised by appellants that the decrees of the Circuit Court of Nicholas County should be held void because not sustained by the evidence is not well taken:**

(a) *Such question is not subject to collateral attack;*

(b) *The record and recitals in the decrees disclose that there was evidence before the Court;*

(c) *In the absence of affirmative proof to the contrary, the presumption of law is in favor of the jurisdiction of the Circuit Court of Nicholas County.*

## ARGUMENT.

### THE CIRCUIT COURT OF NICHOLAS COUNTY HAD JURISDICTION.

In a general way this question is the one and only question to be decided in this cause, although we have above subdivided the several questions which arise under this general proposition. Counsel for appellants seem to

take the same view, as under their brief they make the general proposition that the Circuit Court of Nicholas County did not have or acquire jurisdiction, and proceed to subdivide the several questions to be considered under their theory tending to establish their contention.

It is the contention of appellees, and appellants will not deny such contention, that if the Circuit Court of Nicholas County in the suit of *Cawley* vs. *Stephenson* and others acquired jurisdiction, then all errors committed would be voidable and not void, except that appellants seem to contend that even though jurisdiction was acquired the decrees of the Circuit Court of Nicholas County would be void because not sustained by the evidence.

It is the purpose of this argument to discuss the questions arising in substantially the same order as set out above and so far as the same can be logically done to answer the argument set out in appellants' brief.

(a) *The Circuit Court of Nicholas County Had Jurisdiction by Order of Publication Independent of the Attachment.*

By a reference to Section 2 of Chapter 133 of the Code of West Virginia, hereinbefore quoted in this brief, it will be seen that said statute gives concurrent jurisdiction in equity in all cases falling under the statute against fraudulent conveyances, and said section provides that "a creditor before obtaining a judgment or decree for his claim may institute any suit to avoid a gift, conveyance, assignment or transfer of or charge upon the estate of his debtor which he might institute after obtaining such judgment or decree, and he may in such suit have all the relief in respect to said estate which he would be entitled to after obtaining a judgment or decree for the claim which he may be entitled to recover."

The suit in Nicholas County was a suit by a creditor who had judgments against W. B. Stephenson in the State of Pennsylvania and was brought for the purpose of setting aside certain conveyances and to subject the property to the payment of said judgments (R. 45-78).

Under our statute and the decisions of West Virginia, the Circuit Court of Nicholas County clearly had jurisdiction of this cause independent of the attachment issued therein.

In the case of *Watkins* vs. *Workman,* 19 W. Va. 78, the Court held as follows:

> "A foreign judgment is a debt and a suit in equity can be maintained on it to avoid a fraudulent or voluntary conveyance without first obtaining a judgment at law in this State under Section 2, Chapter 133 of the Code of 1868."

The decisions of the Supreme Court of West Virginia also hold that by the commencement of a suit authorized by said Section 2 of Chapter 133 of the Code a creditor obtains a lien upon the property proceeded against. This has been held in the case of *Murphy* vs. *Fairweather*, 72 W. Va. 14.

The sixth syllabus in said case reads as follows:

> "By the commencement of a suit authorized by Section 2 of Chapter 133 of the Code a creditor obtains a lien upon the property proceeded against and may have a receiver appointed if there is danger of loss or misappropriation thereof."

Judge Poffenbarger, in the opinion, says:

> "As the attacking party under these statutes has a lien for his debt he has after the commencement of his suit the requisite status of an applicant for the appointment of a receiver in case of the misappropriation or loss of property upon which his lien is. Without the statute, equity might not have jurisdiction, and there would be no basis for a receivership."

The same thing has been held in the case of *Gilbert* vs. *Peppers,* 65 W. Va. 355. The Court in that case held as follows:

> "A general creditor who first attacks a fraudulent conveyance obtains a lien on the property by the institution of his suit and preferences among all of such creditors are determined by the dates of the commencement of their suits, if separate suits are brought, or of the commencement of the suit and the filing of petitions, if all assert their rights in the same suit."

The same thing has been held in the case of *Dent* vs. *Pickens,* 59 W. Va. 274, and in *Moore* vs. *Tierney,* 62 W. Va. 72, and in numerous other West Virginia cases.

Thus we see F. E. Cawley, plaintiff in the suit in Nicholas County, had obtained various judgments against W. B. Stephenson in Pennsylvania and instituted a suit in the Circuit Court of Nicholas County for the purpose of setting aside as fraudulent certain conveyances made by W. B. Stephenson of real estate in said County and to subject said real estate to the payment of said judgments, and under our decisions, hereinbefore set out, he obtained a

lien upon said real estate by the institution of said suit. Attorneys for the plaintiff in this suit seem to lose sight of the fact that equity has jurisdiction of a suit such as the suit that was instituted in the Circuit Court of Nicholas County and that it was not necessary for an attachment to issue, and that, even if an attachment was issued and is for any reason void, the jurisdiction of the Court still stands and the decrees and orders which were entered in said suit are perfectly legal and valid. There are various decisions of our Supreme Court which clearly make the distinction between cases where the jurisdiction of the court depends wholly on the attachment and where the court would have jurisdiction regardless of an attachment.

In the case of *Goshorn's Executor* vs. *Snodgrass*, 17 W. Va. 717, 777, Judge Haymond, in the opinion, says:

> "Thus far I have said nothing as to the validity of the attachment issued in this cause, and as to whether the Circuit Court erred in refusing to quash the said attachment or not, because I am of opinion, that the court had jurisdiction of this case without an attachment, because of the fraud alleged in the bill; that the jurisdiction of the court in the case does not depend solely upon the attachment and levy thereof; that the case as made by the bill shows sufficient equity as to matter of fraud to give jurisdiction to a court of equity to set aside said sales and conveyances of the land in the bill mentioned for fraud as to the creditors of said defendant Snodgrass."

In the case of *Danser* vs. *Mallonee,* Judge Miller, in the opinion, says:

> "According to these decisions, though the original attachment and the return on the original process, to answer the action, may have been properly quashed, plaintiff was entitled to retain the action on the docket for new process and attachment, and it would have been error for the court to have denied him that right. See Section 1, Chapter 106, Code 1913. This case is not like a suit in equity on a claim not due and when jurisdiction in equity depends solely upon the validity of the attachment. In such cases, according to our decisions, the suit falls with the attachment and the bill is properly dismissed."

In the suit in Nicholas County the claim of F. E. Cawley was past due and the jurisdiction in equity, therefore, did not depend upon the validity of the attachment.

As we understand these decisions, in a case where the claim is due equity has jurisdiction without attachment and the creditor obtains a lien upon the property by the institution of his suit.

In the case of *Tennant's Heirs* vs. *Fretts,* 67 W. Va. 569, the Court held:

> "The statute (§§ 11, 12 and 13, Chap. 124, Code 1906) providing for service on a non-resident by publication, or by personal service out of the State, can not authorize the rendition of a personal judgment, or decree, against a non-resident so served; but it does authorize any court, whether of law or equity, to pronounce a judgment or decree binding *in rem,* in any case in which such court would otherwise be competent to do so if the defendant

were personally served within the State.

Equity may, upon service of process on a non-resident by publication, remove cloud from title to land within its jurisdiction by decree, binding only *in rem.*"

In the case of *Birch* vs. *Covert,* 83 W. Va. 752, the Court held:

"A vendee may maintain a suit against a non-resident vendor of land in this State in the county where the land is, on order of publication, and where no specific acts or covenants are required to be performed by the vendor other than execution of a deed conveying the legal title, the court may grant relief by a decree in the nature of a decree *in rem* appointing a special commissioner to convey the legal title."

In the case of *Witten* vs. *St. Clair,* 27 W. Va. 762, the Court held:

"In an action of ejectment to recover land situate in this State, if the defendant be a non-resident he may be proceeded against by order of publication, or the declaration and notice may be served upon him outside of the State in the manner prescribed by Section 13, Chapter 124 of the Code, and either mode of service will confer jurisdiction upon the forum *rei sitae* to determine the ownership of the land in controversy."

In the case of *Adams* vs. *Cowles,* 95 Mo. 501, the Court held:

"A suit to set aside a deed as being in fraud of

creditors, is one for the establishment of a right to real property within the meaning of the statute (R. S. § 3494) authorizing, in such case, service of notice by publication on non-resident defendants."

In the case of *McLaughlin* vs. *McCrory,* 55 Ark. 442, 29 A. S. R. 56, the Court held:

"A state possesses the power to provide for the adjudication of land titles within its limits, as against non-residents who are brought into court only by publication, even though a court of equity where the defendant is found might be competent to force him to execute a release of his claim of title.

Courts of equity may be empowered by statute to annul deeds for fraud, and to establish titles to lands within their jurisdiction by mere force of their decrees, and to that extent their action is *in rem.*

A suit in equity to cancel a deed for fraud is, under the Arkansas statute, a proceeding *in rem,* and may be prosecuted against a non-resident by publication of summons."

In the case of *Quarl* vs. *Abbett,* 102 Ind. 233, 52 Am. Reps. 662, the Court held:

"A judgment setting aside a fraudulent transfer of corporate stock by a non-resident may be rendered upon constructive service of process, and it is not essential that the creditor should first obtain judgment on his demand."

This question seems to have been definitely settled by

this Court in the case of *Arndt* vs. *Griggs,* 134 U. S. 316, 33 L. Ed. 918. In that case the Court held:

> "A state has power by statute to provide for the adjudication of titles to real estate within its limits as against non-residents who are brought into court only by publication.
>
> The procedure established by the State in this respect, is binding upon the Federal courts.
>
> The disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated.
>
> The court can acquire jurisdiction to quiet title by constructive service against non-resident defendants by publication where the statutes of the state provide for and allow such mode of service in such cases."

Mr. Justice Brewer, in delivering the opinion of the Court, cites with approval the case of *Adams* vs. *Cowles, supra.*

We submit, therefore, that, even if the Court should be of the oipnion that the affidavit for attachment is bad, and the attachment is void, still the Circuit Court of Nicholas County had jurisdiction of the case and in no event could the orders and decrees entered therein be void, but, at the worst, could be only voidable and can not be attacked collaterally in a suit of this kind.

But the appellants lay great stress upon the proposition that there was no completed substituted service of process as to the defendants, which proposition, if true, would make the point above discussed immaterial.

## *MISNOMER IN CAPTION OF ORDER OF PUBLICATION.*

Appellants in their argument say that while there was an order of publication the caption sets forth the name of Emma Thomas, whereas her true name was Emma Thomson, and attempt to argue that this fact alone is sufficient to deny jurisdiction to the Circuit Court of Nicholas County as to any of the defendants in that suit. The defendants in that suit being the plaintiffs in the suit later brought in the United States District Court and now before this Court for review. At this point the attention of the Court is called to the fact that while one of the defendants is described as Emma Thomas in the caption of the order of publication as shown in the record, nevertheless she is properly described in the body of the order of publication and is further required to appear in her own proper name in the notice. This question was not raised in the United States District Court.

In this connection we desire to call the Court's attention to the case of *Grannis* vs. *Ordean*, 234 U. S. 383, 58 L. ed. 1363. Mr. Justice Pitney, in delivering the opinion of the court, says:

> "The trial court was of the opinon that the question turned upon whether 'Guillfuss' and 'Geilfuss', were *idem sonans*, and held that since 'Geilfuss' is evidently a German name, the first syllable must be pronounced with the long sound of 'i', while the first syllable of 'Guilfuss' would necessarily be pronounced with the short sound of 'i'. The Court therefore concluded that the names were not *idem sonans*, and that the difference was fatal. The Supreme Court agreed that 'Geilfuss' and 'Guilfuss'

were not *idem sonans,* but held that this was not the proper test; that where a summons is served by publication, the true test is not whether the name sounds the same to the ear when pronounced, but whether they look substantially the same in print (following Lane v. Innes, 43 Minn. 137, 143, 45 N. W. 4; D'Autremont v. Anderson Iron Co. (D'Autremont v. Gaylord), 104 Minn. 165, 17 L. R. A. (N. S.) 236, 124 Am. St. Rep. 615, 116 N. W. 357, 15 Ann. Cas. 114); and assuming that the name of the judgment creditor of McKinley was Albert B. Geilfuss, assignee, the court said: 'The question then is, placing the names 'Albert Guilfuss, assignee,' and 'Albert B. Geilfuss, assignee,' in juxtaposition, was there so material a change as to be misleading?' This was answered in the negative.

Were we to theorize, we might say that while each of these tests is helpful, neither is altogether acceptable if perfect accuracy were the aim; not the test of *idem sonans,* because it does not appear that all persons would necessarily pronounce Geilfuss with the long 'i', or Guilfuss with the short 'i'; and not the test of the appearance of the names as printed and placed in juxtaposition, because, in fact, as the names appeared in the summons published and mailed, it was 'Guilfuss' alone, without any name in juxtaposition to serve as a standard for comparison. *And we think both tests are inadequate if applied without regard to what was contained in the summons besides the mere name and addition, 'Albert Guilfuss, assignee'. The record, as it happens, contains no copy of the summons; but from findings and admissions that are*

*in the record, we know that it was in due form, and therefore that it contained such notice of the commencement of the action and of its purpose, and such warning to appear and answer, as would constitute due process of law if served upon a defendant within the jurisdiction* (Minn. Stat. 1894, §§ 5194, 5195); *and that it contained, inter alia, a brief description of the property sought to be divided* (Minn. Stat. 1894, § 5773, marginal note, *supra*). *The underlying question is a practical one,—whether, notwithstanding the misnomer, the summons as published and mailed, being otherwise unexceptionable, constitutes a substantial compliance with the Minnesota statute and sufficient constructive notice to the party concerned. In determining this, we need not confine ourselves to the test of idem sonans, nor to the appearance of the name in print, but may employ both of these, with such additional tests as may be available in view of what is disclosed by the record.* One such additional test, we think, is whether, when two letters reached the postoffice at Milwaukee, one addressed 'Albert Guilfess, assignee, the other addressed 'Albert B. Guilfuss,' they or either of them would, in reasonable probability, be delivered to Albert B. Geilfuss, then a resident of that city. *Another is whether, assuming that the summons as so mailed, or as published in Duluth, and containing the misspelled names or either of them, had come to the eye of the veritable Albert B. Geilfuss, or of any person knowing him by that name, and sufficiently interested in him to acquaint him with its contents if apprised that it was intended for him, the summons, as a whole, would probably have conveyed*

***notice that Albert B. Geilfuss was the person intended to be summoned. Both of these questions are, we think, to be answered in the affirmative.*** In view of the well-known skill of postal officials and employees in making proper delivery of letters defectively addressed, we think the presumption is clear and strong that the letters would reach—indeed, that they did reach—the true Albert B. Geilfuss in Milwaukee. *And it seems to us that any person knowing him, and knowing the correct spelling of his name, and having reason to acquaint him with the contents of a notice of this character if supposed to be intended for him, would probably realize for whom such notice was intended, notwithstanding the name was spelled 'Guilfuss'.* The general resemblance between the names is striking, however they are to be pronounced. And the designation 'assignee' was an additional means of identification. That Geilfuss himself, upon receiving the notice, would be sufficiently warned that it affected his interest in the Minnesota lands under his judgments against McKinley, is free from doubt. He would, of course, observe the misnomer; but, having received the notice which it was the purpose of the law to convey to him, he could not safely ignore it on the ground of the mistake in the name, any more than, if personally served with summons within the state of Minnesota, he could have ignored it on account of a similar misnomer.

We conclude that there was due process of law in the partition suit, and that therefore the present judgment should be affirmed." (Italics are ours.)

The names of all the defendants in the caption of the

order of publication, except Emma Thomson, are spelled correctly and all of these defendants are either brothers or sisters of Emma Thomson. The object of the suit is fully set out in the order of publication (R. 27), and in setting out the object of the suit Emma Thomson's name appears correctly spelled and in the part of the order of publication in which the defendants are ordered to appear and protect their interests Emma Thomson's name is spelled correctly. We do not believe that the doctrine of *idem sonans* or the doctrine as to whether the names "Thomas" "Thomson" look substantially the same in print should be applied in this case, but that the whole order of publication should be looked to, and the test should be whether the order of publication as a whole would have conveyed notice that Emma Thomson was the person intended to be summoned, and we submit that, applying this test, there can be no doubt whatsoever in reference to this matter, and the case of *Grannis* vs. *Ordeans, supra,* holds that this is the proper test.

In reference to this point, appellants in their biref, on page 14, quote from 19 R. C. L., p. 1335. The part there quoted is part of paragraph 13, and leaves the impression that if substituted or constructive service of process is made under the wrong name the service will not be validated by resort to the doctrine of *idem sonans.* In order to correct any such impression we will quote the balance of said paragraph 13, which reads as follows:

> "Other courts take a more liberal view and apply the general doctrine of *idem sonans* to service by publication. Still other courts take the position that where the summons is served by publication, the true test should not be whether the names are

> strictly *idem sonans*—sound the same to the ear when pronounced—but whether they look substantially the same in print. *If the variation is not such as to mislead the defendant or his friends or acquaintances, it should not be held fatal."* (Italics are ours.)

Appellants cite several cases which apparently hold certain names are not to be *idem sonans.* We believe that just as many, if not more, cases could be cited wherein it was held that the doctrine of *idem sonans* did apply, and in this connection we call the Court's attention to 19 R. C. L., p. 1337, paragraph 17, which reads as follows:

> "Names Held *Idem Sonans.*—Among the names which have been held *idem sonans* are the following: 'Benani' and 'Benoni', 'Blunt' and 'Blount', 'Bobb' and 'Bubb', 'Conada' and 'Kennedy', 'Critz and 'Kreitz', 'Deadema' and 'Diadema', 'Dugald' and 'Dougal', 'Edmindson' and 'Edmundson', 'Edmond' and 'Ed', 'Edward' and 'Edwin', 'Faust' and 'Foust', 'Forris' and 'Farris', 'Johnson' and 'Johnston', 'Josier' and 'Josiah', 'July' and 'Julia', 'Kellier' and 'Kealiher', 'Meyer' and 'Maier', 'Penryn' and 'Pennyrine', 'Pillsby' and 'Pillsbury', 'Serelda' and 'Zerelday', 'Staunton' and 'Stanton', 'Tilter' and 'Tiller', 'Wilkerson' and 'Wilkinson.' "

*POSTING OF ORDER OF PUBLICATION.*

Another question raised for the first time, and which can be considered with the question above noted, is that the substituted service was not complete, because, admittedly published as required by the statute, appellants'

claim that there was no posting as also required, or, rather, that the record does not show affirmatively that the notice was posted.

The record is silent as to the posting of the order of publication. It is true that the statute does say, that an order of publication shall be published and shall be posted at the door of the court house of the county in which the court is held at least twenty days before the judgment or decree is entered, but while the same goes into details as to the manner of publication it designates no officer to post said notice and is silent as to the proof required of such posting. It seems from our investigation that the practice as to posting notices of publication is not uniform in the several circuits of West Virginia. In some circuits, the notices are usually posted by the clerk of the circuit court at the time an order of publication is granted. In other circuits it seems to be the practice for the publisher of the newspaper to post the notice and to include such fact in his certificate of publication, making the same read that the annexed notice was published for four successive weeks and was posted, while it is our understanding that in other circuits notices are posted by the attorneys concerned.

While it is true that the record does not affirmatively show that notice was posted, on the other hand there is no proof whatever in the record that the notice was not posted.

As to the posting of the notice of the order of publication it is the contention of appellees that under the decisions of West Virginia and this Court the presumption, on this issue, is in favor of the appellees, that the notice was posted, especially in view of the fact that the decree of the Circuit Court shows, that the order of publication was duly executed.

In fact appellants in their brief cite and rely on a case

which sustains the proposition contended for by the appellees.

Appellants' brief, page 8, says:

> "The subject of substituted service by order of publication was again before the Supreme Court of Appeals of West Virginia in the case of *Styles* vs. *Laurel Fork Oil & Coal Company,* 45 W. Va. 374, and Points 2 and 3 of the syllabus in that case read as follows: 'Where it does not appear from the record whether process was duly served, or order of publication duly published and posted, or not, except from the decree, which declares that "process was duly served" or "order of publication was duly executed as to the defendants" it will be presumed that it was so served or executed.' "

The above syllabus clearly sustains the proposition of appellees herein, but a further examination of the opinion in the case of *Styles* vs. *Laurel Fork Oil & Coal Company, supra,* is even stronger in favor of appellees, because by reference to the opinion, page 379, it will be seen that,

> "in the case at bar the record shows the order of publication, and shows that it was duly published and posted as to the defendants against whom it was taken, but it shows also upon its face that the defendant corporation was not included among the defendants who were ordered to appear. In the absence from the record of the process, in view of the declaration in the decree that 'process was duly served,' or that 'order of publication was duly exevuted,' the presumption would be that it was so; but when the process or order of publication, with

> the evidence of its service or execution is shown in the record, and from which it clearly appears that the order was not taken or published as to the defendant corporation, the decree raises no such presumption."

Again, on page 378, it will be seen:

> "No order of publication was awarded or published either against the defendant corporation or the 'unknown parties'. No process was served on the corporation and it entered no appearance."

Notwithstanding the fact that the party complaining had not been named, nevertheless, the court holds that, if it had not been for the proof that the order of publication was not published and posted as to the complainant, which fact affirmatively appeared in the evidence, the court would have held that the presumption arising from the recital in the decree, that order of publication was duly executed, would have prevailed.

Appellants also rely upon the case of *McCoy's Executors* vs. *McCoy's Devisees*, 9 W. Va. 443. In that case Moore, Judge, in the opinion, says:

> "In the record before us we find at February rules, 1867, a decree *nisi*, at the March rules the 'bill taken for confessed' followed decrees of the Circuit Court affecting the interest of absent defendants who have not been brought before the court in any way. But it is argued that 'the decrees recite that process was duly served.' The only decree that mentions the process is that of April 15, 1870, which recites that the cause came on

> to be heard 'upon the bill, exhibits, summons returned executed as to the home defendants, *and order of publication as to the absent defendants'*, etc. The decree does not state that the order of publication had been duly executed and is therefore not within the doctrine of Hunter's Executors vs. Spotswood, 1 Wash. 145, nor Gibson vs. White, 3 Munf. 94, on that point."

Thus it is clearly seen that this case is not in point with the case at bar, for the reason that the decree did not state that the order of publication had been duly executed.

Appellants also rely on the case of *Coal River Navigation Company* vs. *William H. Webb,* 3 W. Va. 438. In that case the Court held:

> "A mere recital in a decree that an order of publication was returned 'duly executed by publication in a newspaper,' etc., would not be sufficient in itself to establish it, if nothing else appeared in the papers of the cause to show how it had been executed."

Berkshire, Judge, in the opinion, says:

> "An objection is also urged by the appellants as to the proof of the proper execution of the order of publication, as well as to its regularity and validity. The decree complained of recites that the order of publication as to certain non-resident defendants was returned 'duly executed by publication in the *Kanawha Valley Star,* a newspaper in Kanawha County, West Virginia, for four succes-

sive weeks, commencing on the 13th day of August, 1860.

"If this were all the evidence in the record of the due execution of said order, it would be clearly insufficient, as it does not show a compliance with the statutory provision which then required that a copy of such order should also have been posted at the front door of the Court House of the County of Kanawha, on the first day of the next County Court after the order was entered.

"But by an affidavit of the publisher of said paper found in the record it appears that the order was duly published in the paper, as recited in the decree, and also that a copy of the same was posted by the said appellant, at the front door of said Court House, on the first day of the next County Court of said County after the order was entered. If there was no other objection to the order, therefore, there would, as I think, be no error in the decree, so far as it is founded on it, nothwithstanding the recital therein, as to the due execution of the order, would be insufficient in itself to establish it.

"But the order, it appears, issued on the 11th day of August, 1860, and was therefore neither issued in court nor at rules as required by the 11th Section of Chapter 170 of the Code of 1860, p. 708, and as the clerk had no authority under the law to issue it at that time, it follows that it was a nullity and ought to have been dismissed by the Circuit Court."

This case is not in point with the case at bar, for the reason that the decree did not state that the order of

publication had been duly executed and then stopped, but went further and explained that it had been duly executed by publication in the Kanawha Valley Star, a newspaper in Kanawha County, Virginia, for four seccessive weeks, commencing on the 13th day of August, 1860. In the case at bar the decree states "upon the order of publication duly executed as to the defendants, who are non-residents and have been regularly proceeded against as such," and the presumption from this recital in the decree is that the order of publication had been both duly published and posted.

In the case of *Craig* vs. *Sebrell*, 9 Gratt. 131, (Va.) the Court held as follows:

> "In a suit in which there is an absent defendant, the decree recites that the cause came on as to him upon the bill, etc., and order of publication duly executed. This is conclusive that the order was duly made, published in the newspaper and posted at the front door of the court house."

In the case of *Moore, et als.* vs. *Holt*, 10 Gratt. 284 (Va.), the Court held:

> "The decree states that the order of publication against the absent defendant had been duly published. It is to be taken in an appellate court that everything required by the statute was done."

Lee, Judge, in the opinion, says:

> "The next objection is, that there is no proof in the record to show that the order of publication against the alleged absent defendant had been duly executed as the law requires. The decree, how-

ever, states that the order of publication against Joseph Holt had been duly published and as due publication requires both the insertion of the order in a newspaper for the prescribed period and the posting of it at the court house door in due time the decree must be construed to import that both were done. And it has been decided by this court on several occasions that where the decree states that publication has been made, it will be sufficient, and this court will not look into the record for the evidence of the fact."

In the case of *Scott* vs. *Ludington,* 14 W. Va. 387, the Court held:

"But if there was no objection in the court below as to the manner, in which the order of publication was issued, or executed, so as to bring the matter before the inferior court and have the question as to the sufficiency of the order of publication passed upon by that court, and the decree recites that the order of publication as to the absent defendants was 'duly executed,' the objection that it was not so executed will not be entertained by the appellate court."

In the case of *Taylor's Executors* vs. *Cox,* 32 W. Va. 149, the court held:

"Although an attachment sued out in this case appears to have been quashed, yet, the decree of the court below recited, that the cause was heard upon the attachment duly levied upon the lands of J. O. C., in this court said attachment must be

taken to have been in full force and effect, duly sued out and levied as required by statute."

English, Judge, in the opinion, says:

"Is it to be presumed, that the Circuit Court of said County would in two successive decrees recite the fact, that the case came on to be heard upon the attachment sued out and levied, if there was no such attachment? I think not.

"In the case of *Moore* vs. *Holt*, 10 Gratt. 284, it is held: 'Where the decree states, that the order of publication against the absent defendant had been duly published, it is to be taken in an appellate court, that everything required by the statute has been done'; and in this case, the decree stating that the case was heard upon the attachment duly levied upon the lands of the defendant James O. Cox, it is to be taken that there was an attachment regularly sued out and properly levied upon said lands."

In the case of *Voorhees* vs. *Jackson,* 10 Peters 449, 9 L. Ed. 490, the Court held:

"Ejectment for a tract of land commenced in 1831, which had been sold under the foreign attachment laws of Ohio; the defendants in the ejectment being in possession under the defendant in the attachment. The judgment, in the Common Pleas of Hamilton County, Ohio, in the attachment suit was entered in 1808. The writ of attachment was returnable to April, 1807; and it recited that it had been sufficiently testified to the court that the

defendant, not residing in the State, was indebted to the plaintiff. The tract of land was attached, and returned with an inventory and appraisement. The defendant having made default, auditors were appointed, and at December Term they made a report, finding due to the plaintiff $267. The court ordered the property to be sold by the auditors. At April Term, 1808, they reported they had sold the premises for $170. The court, on inspection, confirmed the sale. The auditors afterwards conveyed by deed to Samuel Foster and William Woodward, who on the same day, 28th of May, 1808, conveyed the premises to William Stanley, with covenant of seisin, power to sell and general warranty, under whom the plaintiffs in the ejectment derived title. The proceedings in the attachment were in conformity with the Ohio attachment laws in all particulars, except, 1. No affidavit, as required by the statute, was found filed with the clerk; and the law provides that, if this is not done, the writ shall be quashed, on motion. 2. Three months' notice of the attachment is to be given in a newspaper, and fifteen days' notice is to be given by the auditors; which did not appear to have been done. 3. The defendant is to be called three times preceding judgment, and the defaults recorded. No record appeared to have been made. 4. Auditors are not to sell until twelve months, and it did not appear when the sale was made. 5. The return of the sale shows a sale to Foster and Woodward, and a deed was made to Stanley, and no connection between them was shown in the record.

BY THE COURT: The several courts of com-

mon pleas of Ohio, at the time of these proceedings, were courts of general civil jurisdiction; to which was added, by the Act of 1805, power to issue writs of attachment, and order a sale of the property attached on certain conditions; no objection, therefore, can be made to their jurisdiction over the case, the cause of action or the property attached. The process which they adopted was the same as prescribed by the law; they ordered a sale, which was executed, and on the return thereof gave it their confirmation. This was the judgment of a court of competent jurisdiction on all the acts preceding the sale, affirming their validity, in the same manner as their judgment had affirmed the existence of a debt. There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done till the contrary appears. This rule applies as well to every judgment or decree rendered, in the various stages of their proceedings, from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of their record; which thenceforth proves itself, without referring to the evidence on which it has been adjudged.

That some sanctity should be given to judicial proceedings; some time limited, beyond which they should not be questioned; some protection afforded to those who purchase at sales by judicial process, and some definite rules established by which property thus acquired may become transmissible, with security to the possessors, cannot be denied. In this country particularly, where property, which

within a few years was but of little value, in a wilderness, is now the site of large and flourishing cities; its enjoyment should be at least as secure as in the country where its value is less progressive.

It is among the elementary principles of the common law that whoever would complain of the proceedings of a court must do it in such time as not to injure his adversary by unnecessary delay in the assertion of his right. If he objects to the mode in which he is brought into court, he must do it before he submits to the process adopted. If the proceedings against him are not conducted according to the rules of law and the court, he must move to set them aside for irregularity; or, if there is any defect in the form or manner in which he is sued; he may assign those defects specially, and the court will not hold him answerable till such defects are remedied. But if he pleads to the action generally, all irregularity is waived, and the court can decide only on the rights of the parties to the subject matter of controversy; their judgment is conclusive, unless it appears on the record that the plaintiff has no title to the thing demanded, or that in rendering judgment they have erred in law. All defects in setting out a title, or in the evidence to prove it, are cured; as well as all irregularities which may have preceded the judgment."

In the case of *Applegate* vs. *Lexington and Carter County Mining Co.,* 117 U. S. 255, 29 L. Ed. 892, the Court held:

"Where a court of general jurisdiction is authorized to bring in by substituted service nonresident defendants interested in property within

> its jurisdiction, but is not required to place the proof of service upon the record, and it orders such service, it will be presumed in favor of the jurisdiction that service was made as ordered, although no evidence thereof appears of record; and a judgment affecting the property will be valid."

It will be noted in this connection that there is nothing in the West Virginia statutes hereinbefore cited or any other West Virginia statutes, so far as we have been able to ascertain, that requires the proof of service by order of publication upon the record.

In the case of *Ballard* vs. *Hunter*, 204 U. S. 240, 51 L. Ed. 461, the Court held:

> "A decree for the sale of lands for unpaid levee taxes based on constructive service can not be deemed to deny a due process of law because there was not sufficient proof of publication of a warning order or notice filed or produced in court when the decree was made, where, under the local procedure, the entry of a warning order, even if required, is not jurisdictional." "A recital in a decree for the sale of lands for unpaid levee taxes that the nonresident defendants were 'severally constructively summoned by publication * * * proof of which has been previously filed herein' is conclusive as against a collateral attack based on the objection that there was no sufficient proof of publication of the warning order or notice filed or produced in court when the decree was made, where, under the local procedure, the entry of a warning order, even if required is not jurisdictional."

Mr. Justice McKenna, in delivering the opinion of the Court, says:

> "And the decree recites that the defendants 'were severally constructively summoned by publication * * * proof of which has been previously filed herein.' The contention of plaintiffs in error is therefore answered by *Grignon* vs. *Arter*, 2 How. 319, 11 L. Ed. 283; *Sargeant* vs. *State Bank*, 12 How. 371, 13 L. Ed. 1028; *Voorhees* vs. *Jackson*, 10 Peters 449, 9 L. Ed. 490; *Applegate* vs. *Lexington & C. County Min. Co.*, 117 U. S. 255, 29 L. Ed. 892."

Appellants in reference to this point cite several cases from other States. The decisions of the courts in other States would depend upon the statutes of those States, which might be entirely different from the statutes of West Virginia in reference to orders of publication, and in view of the fact that this question seems to be so well settled by the West Virginia cases and by the decisions of this Court, we do not deem it necessary to take up these cases cited by appellants.

(b) *By Order of Publication and Attachment of the Property Sold to Satisfy Plaintiff's Debt.*

The question as to the regularity of the order of publication has been discussed above and therefore under this heading the question of the validity of the attachment will be discussed and the claim of the appellants, to the effect that the affidavit for the attachment is bad, will be met.

As to this proposition appellees contend, first, that the affidavit was sufficient; second, that if the same is irregular and in the particulars claimed by the appellants, nevertheless such irregularities and defects do not affect

the jurisdiction of the Court, even if the court would not have had jurisdiction if there had been no attachment; and, third, that the court had jurisdiction of this case regardless of whether or not there was an attachment. This last propoistion, however, having been discussed above, and is therefore only referred to here.

*IN GENERAL.*

A copy of the record filed with plaintiffs' bill shows that affidavit was filed in accordance with Section 1, Chapter 106 of the Code of West Virginia, upon the ground that the defendants were non-residents of this State; that order of attachment issued and was levied upon the real estate in the bill and proceedings mentioned; that such attachment was sued out in the court of equity as provided for in said section; that there was an order of publication against all of the defendants duly published; that the officer levying said attachment made return in accordance with Section 7, Chapter 106 of the Code and that plaintiff acquired a lien upon the real estate in accordance with Section 9 of Chapter 106 of the Code; that said order of publication was in accordance with Section 17, Chapter 106 and as prescribed in Chapter 124 of the Code; that there was no appearance, either special or general, by any of the defendants at any time and that more than two years had expired since the entering of the final decree before this suit was brought in the District Court of the United States; that said defendants made no attempt to contest the right of attachment and filed no plea in abatement, nor made a motion to quash as provided for in Section 19, Chapter 106 of the Code; that the claim of plaintiff was, in the opinion of the court, established and judgment rendered by said

court, sale of said real estate ordered in accordance with Section 20 of Chapter 106 of the Code; that the Court prescribed in the order the terms of sale, person by whom it should be made, and complied with all other provisions of Section 21, Chapter 106 of said Code; that the Court required plaintiff to give bond with sufficient security and in the penalty prescribed by the Court, with condition that the plaintiff would perform such further orders as might be made by the Court in case the defendants appeared and made a defense therein within the time prescribed by law and as provided by Section 22 of Chapter 106 of said Code; that defendants did not within two years from the date of final decree petition to have the proceedings in said suit reheard as provided by Section 25, Chapter 106 of said Code; that after the expiration of said two years, to-wit, on the 19th day of May, 1923, an order was entered in said suit discharging said bond and releasing the surety company from further liability thereon. (R. 43.)

*REGULARITY OF AFFIDAVIT.*

It has been noted from appellants' bill that the affidavit is claimed to be void, for the reason that it is claimed that, in order to have a valid attachment, the affidavit must set out the nature of plaintiff's claim with the same certainty and directness that is required in a declaration or other pleading, and that the affidavit filed in this case simply states that the plaintiff's claim is one arising out of contract. The affidavit in question will not support the claim made by plaintiffs.

Section 1, Chapter 106 of the Code of West Virginia provides, amongst other things, that when a suit in equity is about to be or is instituted for the recovery of a claim

or debt arising out of contract, the plaintiff, at the commencement of the suit or at any time thereafter and before judgment, may have an order of attachment against the property of defendants on filing with the Clerk of the court in which such suit is brought, his own affidavit or that of some creditable person, stating the nature of plaintiff's claim and the amount, at the least, which the affiant believes, the plaintiff is justly entitled to recover in the action or suit, and also that affiant believes that some one or more grounds exist for such attachment.

An examination of the affidavit (R. 33) will show that same is made by T. W. Ayres, attorney for plaintiff, and that he has strictly followed the statute; that he first avers that the plaintiff has instituted suit against the defendants for the recovery of a debt arising out of contract; that he next states the nature of plaintiff's claim with great particularity, saying that the debt comprises a total amount of $33,222.10; that said suit is also to set aside and annul two certain deeds and to subject said interest in said real estate of said W. B. Stephenson to sale for the purpose of satisfying any recovery in said suit; that on the 13th day of September, 1915, said plaintiff recovered a judgment in the Court of Common Pleas in Clearfield County, Pennsylvania, against the said W. B. Stephenson for $5,000.00; that on the same day there was a judgment against said Stephenson and another for $4500.00; that on the same day there was another judgment against said Stephenson and another for $5,000.00; that on the same day there was another judgment against said Stephenson and another for $5,000.00; that the last three judgments were duly assigned to said F. E. Cawley, who is now the owner of same; that said judgments with interest and costs therein remain unpaid and are due from said W. B. Stephenson to said F. E. Cawley and

that the said W. B. Stephenson conveyed by the two deeds aforesaid, for the purpose of avoiding said debts and to prevent the enforcement and collection of said judgments; that said conveyances are voluntary, null and void, and that said interest in real estate is subject to any attachment and decree against, or debts of, the said W. B. Stephenson, and that said affiant believes that the said F. E. Cawley is justly entitled to recover in said suit at least the sum of $33,222.10, etc.

The Court will also note that the aggregate of the judgments and costs amount to the penny to the amount stated in the affidavit that the plaintiff is entitled to recover. In other words, the affidavit states that the plaintiff is entitled to recover of W. B. Stephenson a debt arising out of contract in the sum of $19,602.10, with interest from the 7th day of August, 1908, comprising a total amount to this date of $33,222.10. The amount of the various judgments which are set out in said affidavit, including costs, amount to $19,602.10, and the affidavit states that each of said judgments bears interest from the 7th day of August, 1908, and the interest on said judgments from said 7th day of August, 1908, to the date of said affidavit added to the face of said judgments amount to $33,222.10.

There is no foundation, in fact, for the claim made in plaintiffs' bill to the effect that the nature of plaintiff's claim is not stated with sufficient particularity and that the only averment is that plaintiff's claim is one arising out of contract, as certainly a fair construction of the affidavit will show that if same has any fault, its fault is that it tries to follow the statute with too great particularity and that appellants' counsel in this case has mistaken the averment that plaintiff's claim is a debt arising out of contract, as an averment of the nature of plaintiff's claim, when such is not in fact intended and the "nature

of plaintiff's claim" is clearly set out in its proper place in the affidavit. Any other construction would most certainly be strained.

It seems to us that when this affidavit is construed in its entirety and effect given to every portion thereof there can be no doubt whatever that the nature of plaintiff's claim is set out in the greatest detail and complies with the statute and decisions of West Virginia in every respect.

Appellants' counsel are also wrong in their statement of the law when they say that the affidavit must set out the nature of the plaintiff's claim with the same certainty and directness that is required in a declaration or other pleading, although we maintain that such was done in this case.

In the case of *Todd & Smith* vs. *Gates*, 20 W. Va. 464, Snyder, J., in announcing the opinion of the Court, says:

> "It is first insisted by the plaintiff in error that the affidavit on which the attachment in this case is founded, is insufficient. There are several objections taken to said affidavit, but the only one I deem it necessary to notice is, that it does not state the nature of the plaintiff's claim as required by the statute. The affidavit states that the claim, 'is for transcript of foreign judgment.' In McClung v. Jackson, 6 Gratt. 96, under a statute which required the plaintiff to state, in his attachment, the character of his claim, the court held that the statute did not require the plaintiff to describe his claim with the precision of a declaration, nor was it necessary for him to state whether it was due by bond, note, account or otherwise. See also Hay-

wood v. McCrery, 33 Ill. 459; Theirman v. Vahle, 32 Ind. 400; Sullivan v. Fugate, 1 Heis. 20; Klenk v. Schwalm, 19 Wis. 124.

Under these authorities it seems to me the affidavit is sufficient."

In the case of *Duty* vs. *Sprinkle*, 64 W. Va. 39, the Court held:

"Mere difference between the declaration and affidavit in respect to the *quantum* of descriptive matter pertaining to the cause of action, both being in perfect agreement as far as such matter is set forth, does not constitute inconsistency or variance, such as will vitiate the attachment."

In the case of *Flannigan* vs. *Tie & Lumber Company*, 77 W. Va. 158, Lynch, J., in delivering the opinion of the Court, says:

"Defendant challenges the sufficiency of the affidavit made as the basis for the issuance of the attachment writ. The criticism is directed against the clause stating that the action is 'for the recovery of money due upon contract.' This clause alone clearly would be an insufficient justification for the award of that process. It does not state the nature of the claim to be enforced by the action and writ. But the affidavit specifies with necessary particularity the items of the account sued on, and thereby sufficiently shows the nature of such claim."

It seems to us that the case at bar comes clearly within

the rule laid down in *Flannigan* vs. *Tie & Lumber Company, supra.* The rule laid down there was that the affidavit, even though it stated that the action was for money due on contract, was sufficient where it specified the items in the account sued on. In this case it will be noted that the affidavit sets out with great particularity the four foreign judgments sued on and itemizes each as to the amount, costs, date when interest commences, and other particulars concerning the same.

*Even if the Affidavit is Irregular in the Particulars Claimed by Appellants, Nevertheless the Court Has Jurisdiction.*

In this connection we wish to call attention to the case of *Miller* vs. *White,* which seems to be directly in point and conclusive in this case.

The third syllabus is as follows:

> "Where there is no service of process or appearance, and the seizure of property of defendants is the foundation of jurisdiction, defective or irregular affidavits for attachment, though they might reverse a judgment in the case for error in departing from the statute, do not make the suit one without jurisdiction if the court have jurisdiction in cases of that class. A total want of affidavit for attachment in such case would show there was no jurisdiction, but a mere insufficient averment in the affidavit would not. *Cooper* v. *Reynolds,* 10 Wall. 309." *Miller* v. *White,* 46 W. Va. 67.

To practically the same effect is *Hall* vs. *Hall,* 12 W. Va. 1.

The above *Miller* vs. *White,* case has been followed and cited with approval and the doctrine laid down in Syllabus 3 has never been modified or reversed by the courts.

See

*McIntosh* vs. *Augusta Oil Co.,* 47 W. Va. 833-837;
*Caswell* vs. *Caswell,* 84 W. Va. 575-582.

In the case of *Cooper* vs. *Reynolds,* 77 U. S. 308, 19 L. Ed. 931, the Court held:

> "Jurisdiction of the person is obtained by the service of process, or by the voluntary appearance of the party in the progress of the cause.
>
> Jurisdiction of the *res* is obtained by a seizure under the process of the court, whereby it is held to abide such order as the court may make concerning it.
>
> In attachment cases, the levy of the writ of attachment on the property is the one essential requisite to jurisdiction.
>
> Though affidavit preliminary to issuing the writ may be defective, that can not deprive the court of the jurisdiction acquired by the writ levied upon defendant's property.
>
> When the writ has been issued, and the property seized, condemned and sold, this court can not hold that the court below had no jurisdiction for want of a sufficient publication of notice."

We do not think that the case of *Demming National Bank* vs. *Barker,* 83 W. Va. 429; *Citizens National Bank* vs. *Dixon,* 94 W. Va. 21, and *Pelley* vs. *Hibner,* 93 W. Va. 169, are in point for the reason that in each of these cases there was something omitted from either the notice or the

affidavit which was necessary to connect the defendant with the note or claim, as, otherwise, there would have been no liability against the defendants. In the first of said cases the court held that notice of dishonor was necessary to connect the defendant with the note sued on, and in the second of said cases the court held that, because it was not alleged in said notice that Barnes signed the note, the notice was insufficient because it did not show any liability against the defendant Barnes. In the last of said cases the court held that the notice and affidavit failed to state that the claim was either due and owing to the plaintiffs or due and owing by the defendant, and for this reason the notice and affidavit was held insufficient. As we see it, none of these cases are in point with the case under discussion. Naturally you have to connect a defendant with the suit and in each of the cases cited the court held that this was not done. No such question as this arises in the case at bar.

**2. THE CIRCUIT COURT HAVING ACQUIRED JURISDICTION, ITS DECREES ARE NOT VOID BUT MERELY VOIDABLE.**

(a) *Advantage of Errors Can be Taken Only by Appeal or Appearances Within the Time Allowed Under the Statute.*

(b) *Jurisdiction Once Acquired the Action of the Circuit Court of Nicholas County is not Subject to Collateral Attack.*

(c) *The United States District Court for the Southern District of West Virginia is a Court of Concurrent Jurisdiction with the Circuit Court of Nicholas County, West Virginia, and Has no Appellate*

*Powers Nor Jurisdiction to Review the Action of the Circuit Court of Nicholas County.*

Appellees contend that the Circuit Court of Nicholas County having once acquired jurisdiction the law provides adequate means for making defense, not only during the pendency of the suit, but within two years after the entering of the final decree. Appellants are limited to such defense as they could have made in that suit.

> "By attachment sued out pursuant to Chapter 106 of the Code of this State, and levied on the lands or personal property of the defendant, a lien is thereby acquired and the court first to take jurisdiction thereby acquires the exclusive jurisdiction and dominion over the property, with the right to pronounce and enforce any judgments or decrees respecting the same, and this is so whether the property attached be real or personal property taken into actual custody of the officer."
>
> *McGrew* vs. *Maxwell,* 80 W. Va. 718.

We further maintain that the Circuit Court having taken jurisdiction and having decreed all the questions arising on the bill, a suit can not now be maintained in the District Court of the United States, even though originally the suit brought in the Circuit Court of Nicholas County might have been the subject of removal to the United States District Court.

> "Nor can another court of concurrent jurisdiction so interfere by injunction or otherwise upon the principle of avoiding multiplicity of suits; want of equity of the subject matter of the contraversy;

merger of the cause in the judgment or decree of some other court in a foreign jurisdiction. All such supposed rights involve questions proper to be presented to the court first to acquire jurisdiction and dominion over the property involved, as provided either by statute or by some other suitable proceeding of intervention in that court."

*McGrew* vs. *Maxwell, Id.*

"Under our law * * * there is practically no distinction between this sort of mesne process (attachment) and final process of execution. By the one as well as by the other the court acquires the custody and dominion over real as well as personal property, with the right to protect that custody and possession against the encroachment of any other court of co-ordinate or concurrent jurisdiction."

*McCrew* vs. *Maxwell, Id.*

The attention of the Court on this question is called to the case of *Voorhees* vs. *Jackson, supra,* a case decided by this Court. In that case it is said:

"So long as this judgment remains in force, it is in itself evidence of the right of the plaintiff to the thing adjudged, and gives him a right to process to execute the judgment, the errors of the court, however apparent, can be examined only by an appellate court, and by the laws of every country, a time is fixed for such examination, whether in rendering judgment, issuing execution or enforcing it by process of sale or imprisonment. No rule can be more reasonable than that the person who complains of an injury done him should avail himself

of his legal rights in a reasonable time or that that time should be limited by law.

The line which separates error in judgment from the usurpation of power is very definite, and is precisely that which denotes the cases where a judgment or decree is reviewable only by an appellate court, or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so."

In fact all questions raised by appellants in their brief as to the irregularity of the attachment, as to the want of evidence, as to the irregularities in the sale or other questions, are without exception questions which they could and should have taken advantage of on appeal and which, in our opinion, can not now be considered in this suit.

> "It is next claimed as error that the plaintiff, by affidavit or bill, does not show any grounds for attachment, and this suit should have been dismissed for want of equity. This assignment is met by the fact that no motion was made to quash the affidavit or attachment in the circuit court, and the plaintiff, in his bill, alleges that upon his affidavit as prescribed by law, he has obtained from the clerk of said court an order of attachment against the defendant oil company, which allegation is not controverted in the answer. The question raised as to the validity of the attachment comes too late. In Kesler v. Lapham, 33 S. E. 289, this Court held that the supreme court will not consider questions not yet acted on by the circuit court."
>
> *McIntosh* vs. *Augusta Oil Co.,* 47 W. Va. 836.

Referring to the above quotations. It seems clear to us that if the Supreme Court holds that the question as to the validity of an attachment comes too late when presented to that court, then it certainly comes too late when attacked in other proceedings in a court which did not first acquire jurisdiction and whose hands are therefore tied.

The same case, in further discussing the question of attachment, says:

> "Now, the record presented for our consideration contains a proceeding by way of attachment in equity, which, so far as any pleadings or ruling in the circuit court is concerned, remains unassailed; and, such being the case, the jurisdiction in a court of equity cannot be questioned."
>
> *McIntosh* vs. *Augusta Oil Co., Id.*

It seems clear to us from all of the decisions and from the statutes of West Virginia that defendants proceeded against by order of attachment and order of publication are given every possible opportunity to make defense in such proceedings, and that such proceedings are final as to any property attached and sold therein. This is certainly as it should be and in the case before us, the plaintiffs in this suit have certainly showed no special grounds for consideration. They claim that there were irregularities in the affidavit for attachment, but irregularities could and probably should have been brought to the Circuit Court's attention by motion to quash or plea in abatement in the suit in the Circuit Court. While plaintiffs claim that they had no actual notice of the pendency of this suit, we know of no requirement which

provides that they shall have actual notice. The institution of the suit and the order of publication give the court jurisdiction and, in this case, the parties now complaining, waited for more than three years after the commencement of the suit in the Circuit Court of Nicholas County before attempting to protect their interests in any manner, notwithstanding the fact that the real estate now claimed by them in Nicholas County was of great value; that they kept a tenant on the land to inform them of matters affecting the land; that there would have been slight expense to have subscribed to the county papers so as to keep informed of any proceedings against the land; that they were in communication with the Assessor and Sheriff at least once a year during all of said time and it seems peculiar that, according to them, they should have found out about the proceedings in Nicholas County almost immediately after the expiration of two years and should have had no knowledge of same whatever prior to that time.

It is not our intention to quarrel with appellants, however, as to their knowledge or lack of knowledge. They were given all of the notice required by law and delayed prosecuting this case in the United States District Court until the rights of innocent parties had intervened; until the land had been sold and purchased by the defendants, Kirtley and Herold; sale confirmed, all purchase money paid and deed executed, and then for the first time do they complain.

The law provides ample remedy for non-resident defendants and, in fact, for all defendants, in matters of equity.

Even though the defendants in the Circuit Court of

Nicholas County had appeared and made a motion to quash the attachment, the plaintiff would have had a right to have the case retained on the docket for a new process and new order of attachment, if advised; whereas, in the proceedings now attempted to be brought in the United States District Court, this right would seemingly be denied the plaintiffs. See *Danser* v. *Malone*, 77 W. Va. 26.

The method of defense available to the defendants in the Circuit Court of Nicholas County is provided for in Section 19, Chapter 106 of the Code and, amongst other things, provides that the right to sue out an attachment may be contested; that if the defendant desires to contravene the existence of grounds for attachment, he may file plea in abatement and have such issue tried by a jury; that when attachment is properly sued out and the case heard upon its merits, if the court be of the opinion that the claim of the plaintiff is not established, final judgment shall be given for defendant. The decisions also hold that an attachment irregularly issued ought to be quashed *ex-officio* by the court in which it is returnable, even though no plea filed by the defendant, and, therefore, in this case, the Circuit Court must have affirmatively held that the attachment was sufficient

*Mantz* v. *Hendley*, 2 H. & M. 308.

> "It is competent for any party interested and filing his petition disputing the validity of plaintiff's attachment, as provided for under Section 24 of chapter 106, to move the court to quash the affidavit and attachment * * *."

*Capehart's Exr.* v. *Dowery*, 10 W. Va. 130.

"A decree overruling a motion to quash an attachment is an interlocutory but appealable decree, and does not preclude a renewal of the motion at the same or any subsequent term before final decree."

*Elkins National Bank* vs. *Simmons,* 57 W. Va. 1.

"The right to move to quash an attachment on the ground of an insufficient affidavit is not under section 19 of Chapter 106 waived by appearance and filing an answer."

*Dulin* vs. *McCaw,* 39 W. Va. 721.

See also

*Taylor Exors.* vs. *Cox,* 32 W. Va. 148.

*The Defense to Proceedings By Attachment as Well as the Proceedings Themselves are Statutory and, Consequently, the Mode of Defense Prescribed by Statute Must be Strictly Pursued.*

For the above see:

*Stevens* vs. *Brown,* 20 W. Va. 450.
*Bank of the Valley* vs. *Bank of Berkley,* 3 W. Va. 386.
*Middleton* vs. *White,* 5 W. Va. 572.

*The Defendants in the Circuit Court Also Had a Right to a Rehearing Within Two Years and Failed to Take Advantage of That Right.*

Section 25, Chapter 106 of the Code, *supra.*

This section applies to proceedings wherein an attachment has been sued out and levied upon the property of defendant and in this sort of proceedings, a rehearing is provided for in cases where the defendant did not appear and make defense.

*Farrell* vs. *Camden,* 57 W. Va. 401.

See also

*Johnson* vs. *Ludwick,* 58 W. Va. 464.

*Peoples Nat. Bank* vs. *Burdette, Judge,* 669 W. Va. 369.

*Hayman* v. *Monongahela Consol. C. & C. Co.,* 81 W. Va. 144.

*Defendants in the Circuit Court Not Having Appeared in the Suit Were Not Entitled to an Appeal but Were Entitled to a Rehearing Under Section 25, Chapter 106 of the Code, and Not Being Entitled to an Appeal and Not Having Taken Advantage of the Rehearing, We Do Not See How They Can, After the Expiration of Two Years, Maintain a Separate Suit in a Different Court.*

"An absent defendant, against whom a decree has been made, cannot appeal from the decree. His only remedy is that provided by statute."

*Banks* vs. *Snyder,* 6 W. Va. 24-33.

*Meadows* vs. *Justice,* 6 W. Va. 198.

*Lynch* vs. *Hoffman,* 7 W. Va. 553.

*Foland* vs. *Brownfield,* 73 W. Va. 270.

*Defendants in the Circuit Court Would Have Been Limited As to the Time for Applying for a Removal of Said Cause to the United States District Court Upon the Ground of Diversity of Citizenship and, Therefore, Not Having Made Application Within the Time, How*

***Can They Now Attempt to Bring a New Action in the United States District Court on This Ground After the Circuit Court of Nicholas County Has Not Only Taken Jurisdiction But Has Fully Passed On All Questions Involved?***

It has been seen from citations heretofore made in this brief that the court first taking jurisdiction in matters of attachment acquires right to such jurisdiction which ccanot be taken away either by courts of concurrent or coordinate jurisdiction.

See *McGrew* vs. *Maxwell, supra.*

It has also been seen that another court can not interfere by injunction or otherwise and, therefore, we maintain that the plaintiffs in this suit, having lost the right to a removal of the case from the Circuit Court of Nicholas County, West Virginia, to this Court, have likewise lost the right to maintain an independent action in this Court which has no other object than to now make such defense as would have been made in the Circuit Court of Nicholas County, West Virginia, or could have been heretofore made in this Court, had said case been removed in due time.

**3. APPELLEES, H. L. KIRTLEY AND H. W. HEROLD, WERE NOT PARTIES TO THE SUIT IN THE CIRCUIT COURT OF NICHOLAS COUNTY, BUT MERELY PURCHASERS OF PROPERTY UNDER THE DECREES IN THAT SUIT. THAT SUIT HAVING FINALLY ENDED BEFORE THE INSTITUTION OF THE SUIT IN THE UNITED STATES DISTRICT COURT, THERE WAS NO LIS PENDENS AS TO THEM AND THEIR PURCHASE BECAME FINAL.**

(a) *Said Kirtley and Herold in Any Event Should Be Protected in Their Purchase.*

(b) ***Any Issues Raised in the Suit Now Pending and Decrees Thereon Should Be Restricted to the Fund Arising From Said Sale, and Should Not Be Permitted to Affect the Title of Appellees, Kirtley and Herold, at This Time.***

The courts hold that a purchaser of real estate *pendente lite* takes title subject to the outcome of the pending suit but they also hold that such purchaser is not a purchaser *pendente lite* when any time intervenes between the final decree of the suit and the institution of another suit and for this purpose, it is held that even an appeal to an appellate court is a new suit and the purchaser is protected unless there is a *lis pendens* and unless the writ of error of the appellate court also grants a supersedeas. It has also been held in numerous cases that a bill of review is a new suit and, of course, it can not be contended in this suit that the present suit instituted by John W. Stephenson and others in the District Court of the United States for the Southern District of West Virginia against Kirtley and Herold, who were not parties to the suit in the Circuit Court, is not a new suit. There was no *lis pendens* between the final decree of the Circuit Court of Nicholas County and the institution of this suit. Granting that Kirtley and Herold were purchasers *pendente lite* until the expiration of the two years provided by statute from the entering of the final decree, in which the defendants had a right to a bill of review, it certainly can not be contended that they are purchasers *pendente lite* after that time and, therefore, it seems perfectly clear that no order or decree should be entered by the District Court of the United States which will in any wise affect their title to the real estate purchased.

In the case of *Perkins* vs. *Pfalzgraff,* 60 W. Va. 121, it was held that the rights acquired *bona fide* by a third person under a final decree rendered by a court of competent jurisdiction would not be affected by any subsequent reversal of the decree upon a bill of review.

Attention is also called to the fact that in the Statutes of West Virginia, Sec. 26, chapter 106, *supra,* and Sec. 8, chapter 132, *supra,* it is also held that the right of purchasers shall not be affected, but that non-resident defendants who have not appeared during the pendency of the suit but asking for a review within the two years provided, are limited to the proceeds of sale and such review can not affect the title to the property.

In *Hollister* vs. *Mann,* 40 Nebr. 572, 58 N. W. 1126, it was held that an order confirming a sale was just as final as a final judgment, and left pending nothing which would impart notice of what might result provided proceedings should be commenced to set aside such order of confirmation.

Under a statute providing that a party constructively summoned in a suit might, within five years of the date of the judgment, have the same opened and be let in to defend, it was held in *Scudder* v. *Sargent,* 15 Nebr. 102, 17 N. W. 369, that a purchaser of land under a judgment afterwards opened in accordance with the terms of the statute above mentioned was not a purchaser *pendente lite* where the purchase was prior to the actual opening of the judgment. And to the same effect are *Keene* v. *Sallenbach,* 15 Nebr. 200, 18 N. W. 75; *Citizens State Bank* v. *Haymes,* 56 Nebr. 394, 76 N. D. 867; and *Keller* v. *Stanley,* 86 Ky. 240, 5 S. E. 477.

In *Rector* v. *Fitzgerald,* 8 C. C. A. 277, 19 U. S. 423, 59 Fed. 808, the court said:

> "In our judgment, one who purchases after the lapse of the term at which a final decree on the merits is rendered, without notice that a bill of review is in contemplation or will be exhibited, should be protected from the effect of a decree on such a bill if it is subsequently filed. After a final decree, the losing party, by proper diligence, can always guard against the risk of losing the fruits of the litigation by a sale to an intermediate purchaser; and, on grounds of public policy, it is better to exact of him such diligence in the prosecution of his claim than to suffer the title of valuable property to be clouded for an indefinite period by the possibility that the litigation may be renewed by a bill of review."

But, even independently of that proposition, it was held that, under the particular circumstances of the case, the rule of *lis pendens* could not be successfully invoked against the purchaser.

See also

*Ludlow* vs. *Kidd,* 3 Ohio. 541.

Thus in *Cheever* vs. *Minton,* 12 Colo. 557, 13 Am. St. Rep. 258, 21 Pac. 710, it was held that the title of a purchaser in good faith which rested upon a voidable decree in chancery, the purchase having been made after the entry thereof, and before a writ of error was sued out, would not be affected by a subsequent reversal of the de-

cree on error. And this was followed by *Stout* vs. *Gully,* 13 Colo. 604, 22 Pac. 954.

So, also in *Wadhams* vs. *Gay,* 73 Ill. 111, 415, it was held that parties claiming title under a decree in full effect and before a writ of error had been prosecuted, or any other legal steps had been taken to avoid it, would be protected notwithstanding a subsequent reversal of the decree. And this decision was followed by the later Illinois decisions of *Eldridge* vs. *Walker,* 80 Ill. 270; *Barlow* vs. *Standford,* 82 Ill. 298; *Mulvey* vs. *Gibbons,* 87. Ill. 367.

There are numerous other cases holding that a writ of error is a new suit; and, therefore, a *bona fide* purchaser after the decree and before the suing out of a writ should take title free from the final outcome of the writ of error. Among those cases may be noticed, *McCormick* vs. *McClure,* 6 Blackf. 466, 39 Am. Dec. 441; *Macklin* vs. *Allenberg,* 100 Mo. 337, 13 S. W. 350, etc.

In the case of *Winfield* vs. *Neil,* 60 W. Va. 106, 54 S. E. 47, it is held that one who, after final decree and termination of the suit, and before an appeal is obtained, purchases, in good faith, property which is the subject of the litigation, it will be protected in such purchase.

This same suit lays down a test as to whether a purchaser is a purchaser *pendente lite* or otherwise. The test is laid down in Syllabus 4, which is as follows:

> "In determining the question as to whether or not a purchase is made *pendente lite,* the test is, Was there, at the time of the purchase a suit pending, involving the rule of *lis pendens?* If so, the purchase is *pendente lite.* It is otherwise if there is no such suit pending."

In *Perkins* vs. *Pfalzgraff, Id.*, it is further held that rights acquired *bona fide* by a third party under a final decree rendered by a court of competent jurisdiction are not affected by a subsequent reversal thereof. The decree being final, the bill of review is a new suit, having for its object the correction of the final decree in a former suit.

A reading of the above case will also show that many points in issue are similar to the case now under consideration.

The case of *Voorhees* vs. *Jackson, supra,* hereinbefore cited as to various other propositions in this case, is also applicable to this question.

**4. THE POINT RAISED BY APPELLANTS THAT THE DECREES OF THE CIRCUIT COURT OF NICHOLAS COUNTY SHOULD BE HELD VOID BECAUSE NOT SUSTAINED BY THE EVIDENCE IS NOT WELL TAKEN.**

(a) *Such Question Is Not Subject to Collateral Attack.*

(b) *The Record and Recitals in the Decrees Disclose That There Was Evidence Before the Court.*

(c) *In the Absence of Affirmative Proof to the Contrary, the Presumption of Law is In Favor of the Jurisdiction of the Circuit Court of Nicholas County.*

Appellants contend that the record shows that there was no evidence to sustain the judgment setting aside the deeds to plaintiffs and decreeing sale.

It seems to us that the question of sufficiency of evidence is not a matter which can be raised in this suit. That there was such evidence, there can be no doubt.

The decree of the Circuit Court states, "and it further appearing to the satisfaction of the court from the papers and evidence in this case," etc. It seems to us that this statement is conclusive. While there may not have been depositions, nevertheless plaintiff's claim was fully shown by certified copies of the foreign judgments filed with the bill. The deeds asked to be set aside were shown by certified copies and such deeds on their faces show that the time of transfer was very near the date of the judgments against said W. B. Stephenson and in the first of said deeds, it is stated that W. B. Stephenson, "desiring to convey a portion of *his* interest in said tract of land to the parties of the second part, executes this deed." The affidavit for attachment sets up the fraud and plaintiff's bill sets forth the same averment of fraud and the fact that the conveyances were voluntary. The plaintiff was present upon the hearing of said case and may have been heard. The defendants have been proceeded against by order of publication and, in addition thereto, there was every reason to believe that they had actual notice of the pendency of the suit, they having an agent living in Nicholas County on or near the land in controversy, so it seems to us that in view of the express statement of the Court as to considering evidence before it, that it can not now be successfully contended that there was not sufficient evidence to sustain the decree or that the decree would be absolutely void and susceptible of attack in an independent proceeding for this reason—"Matters alleged in a bill in equity not expressly denied, will be taken as true and no proof thereof will be required."

*McDermott* vs. *Prentiss Gas Co.*, 82 W. Va. 230.

See also

*Irons vs. Croft Hat, etc., Co.*, 866 W. Va. 685.

15 *Ruling Case Law,* page 862, in reference to the insufficiency or incompetency of evidence, says:

> "A judgment of a competent court can not be collaterly attacked on the grounds that it was rendered upon insufficient evidence or incompetent evidence or even without any evidence. Thus if a court has power to act on proof of a given fact, its action on the statement of such fact by an unsworn witness is not for that reason alone entirely void so as to render its judgment void when questioned collaterally. Where the court has jurisdiction a decree without proof or upon insufficient proof is one in the exercise of jurisdiction and can only be the subject of appeal or review. Where a finding of fact is essential to the validity of a judgment the court on collateral attack will presume that such fact was found and a judgment is immune from impeachment on the ground that it is not supported by the findings or that no findings were made. Mistakes in findings of facts by the court usually are not grounds for a collateral attack on the judgment, and it makes no difference how erroneous the determination of facts may be. If the rule was otherwise there would be no final settlement of disputed controversies."

34 *Corpus Juris,* page 562, says:

> "A judgment of a court having jurisdiction can not be impeached collaterally by showing that the evidence on which it was based was illegal, inadmissible or insufficient to sustain the judgment. Indeed the courts have gone so far as to say that a judgment entered in the absence of any evidence

is valid and binding until set aside by some regular proceeding."

In the case of *Leslie* vs. *Gibson,* 80 Kan. 504, 26 L. R. A. (N. S.) 1063, Benson, J., in delivering the opinion of the Court, says:

> "Finally, it is contended that the order opening the judgment was void because there was no proof that the mortgage company did not have notice of the pendency of the action in time to appear and defend. To make the order without such proof may have been erroneous, but did not oust the court of jurisdiction, and the judgment was not void. A judgment may be erroneous but not void, merely because of a defect in the proof, if the court has jurisdiction of the parties and the subject matter."

In the case of *Brown* vs. *Webb,* 121 Ga. 281, 48 S. E. 917, the Court held:

> "On the trial of an affidavit of illegality to an execution the defendant in execution can not go behind the judgment on which the execution is based by showing that the judgment was rendered without sufficient evidence."
>
> "Where in an action in a justice's court upon a sworn account, there was service upon the defendant by leaving a copy of the summons and account at her most notorious place of abode, and defendant did not appear and plead and judgment was rendered in favor of the plaintiff, such judgment is conclusive as against an affidavit of illegality

based upon the ground that plaintiff had introduced no evidence save the verified account, and that judgment could not legally have been rendered by default because there had been no personal service upon the defendant."

In the case of *Thacker* vs. *Chambers* (Tenn.), 42 Am. Dec. 431, the Court, in the opinion, says:

"But it is insisted, that Williams did not have such evidence of his purchase from Chambers as would authorize the decree in his favor. That may be very true, but it is a matter that can not be inquired into in this suit. The court had jurisdiction of the cause, and having made a decree, vesting the title in the defendant Williams, it is not competent in this collateral proceeding between other parties to investigate the ground of proof, upon which the court acted."

In the case of *Parsons* vs. *Parsons,* 101 Wis. 76, 70 A. S. R. 894, the court held:

"A judicial determination may be contrary to conclusive evidence, or legal evidence, or without any evidence, yet not collaterally impeachable for want of jurisdiction."

In the case of *Meyers* vs. *McGavock,* 39 Nebr. 843, 42 A. S. R. 627, the Court held:

"The finding and judgment of a court can not be successfully assailed as void, in a collateral proceeding, on the ground that the court made such finding or rendered such judgment on incompetent evidence."

In any event the decree states that there was evidence in addition to the papers in the suit, and we do not believe that any court will now say in a proceeding of this kind that there was not evidence or that the evidence was insufficient. We do not agree with the attorneys for appellants that the record affirmatively shows that there was no evidence whatever, and in this connection we particularly call the Court's attention to the part of the decree on this point hereinbefore quoted.

The case of *Winston* vs. *McVeigh*, 93 U. S. 274, cited in appellants' brief, is clearly not in point with the case at bar. In that case the defendant was a non-resident and was proceeded against by notice of publication and in answer thereto the defendant appeared by counsel and made answer, which, on motion, was stricken from the file, on the ground that the defendant was an alien enemy. No such state of facts exist in the case under discussion.

The case of *Hovey* vs. *Elliott*, 167 U. S. 409, cited by appellants, is also clearly not in point with the case at bar. In that case the trial court obtained jurisdiction of the defendant by proper process, but struck his answer from the files until he should purge himself of contempt. No such situation as this exists here.

The case of *Parsons* vs. *Russell* (Mich.), 83 Am. Dec. 728, cited by appellants, involved a statute of the State of Michigan, which undertook to provide a seizure and sale of certain property without proof establishing such claim before a judicial tribunal. This statute is entirely unlike the statutes of West Virginia under which the suit in the Circuit Court of Nicholas County was instituted, and,

therefore, we do not see where the case of *Parsons* vs. *Russell* has any application whatsoever to the case at bar.

The facts in the case of *Remer* vs. *MacKay,* 35 Fed. 86, cited by appellants, are not similar to the facts in the case under discussion. In that case Remer was indebted to MacKay and both were citizens of Illinois. Remer's wife obtained a deed to land in Iowa from a third party and MacKay sued Remer and wife in Iowa by substituted service. The Iowa State Court rendered judgment in favor of MacKay against Remer and, without setting aside the deed to Remer's wife or decreeing that she held the same in truth for her husband, directed the sale of the land, which was accordingly sold and conveyed to the plaintiff, MacKay. In the case at bar the decree enters judgment in favor of Cawley against W. B. Stephenson, holds that the deeds sought to be set aside were made to hinder, delay and defraud the creditors of the said W. B. Stephenson, and especially the plaintiff, F. E. Cawley, in respect to the debt and demand therein adjudged to said plaintiff and decrees the said deeds to be set aside and held for naught, but so far only as the said debt and demand of said plaintiff, F. E. Cawley, is concerned, and then decrees that the property covered by said deeds, or so much thereof as may be necessary, be sold to pay the plaintiff's said debt and interest, etc., and the same was sold in compliance with said decree and was purchased by H. L. Kirtley and H. W. Herold, who were entire strangers to the suit. Thus it will be clearly seen that the facts in the case of *Remer* vs. *MacKay* are entirely different from the facts in the case at bar, and, therefore, the decision in the case of *Remer vs. MacKay* should in no way be binding upon this Court in deciding this case.

We also do not think that the case of *Ex Parte Sam-*

*uel,* 82 W. Va. 486, is in point, for the reason that in that case the magistrate did not hear any evidence at all and in that case it was not a question of the sufficiency or insufficiency of evidence.

## CONCLUSION.

We respectfully submit that the decree of the United States District Court for the Southern District of West Virginia sustaining the motion of the appellees, Kirtley and Herold, to dismiss the bill should be affirmed for the several reasons set out above, and more particularly because (1) the Circuit Court of Nicholas County had jurisdiction of the subject matter and of the defendants, and therefore all proceedings in said suit in Nicholas County were voidable, and not void, and advantage could only be taken of same either by appearance in that suit or appeal to the Supreme Court of Appeals of West Virginia or by bill of review, unless said case had been removed to the United States District Court within the time allowed by law, in which event further proceedings would have been in that Court; and (2) because said Kirtley and Herold are not purchasers *pendente lite* within the law and therefore no decree could or should be entered in this case affecting their title to the land in controversy or affecting them in any way.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES.

No. 58.—October Term, 1925.

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|---|---|
| John W. Stephenson, Emma Thomson, Jennie Stephenson, Mary Stephenson and W. B. Stephenson, Appellants, *vs.* H. L. Kirtley, H. W. Herold and F. E. Cawley. | Appeal from the District Court of the United States for the Southern District of West Virginia. |

[November 16, 1925.]

Mr. Justice Sanford delivered the opinion of the Court.

The appellants brought this suit in equity in the District Court to set aside certain proceedings in a Circuit Court of West Virginia, whose validity they challenged, *inter alia*, for repugnancy to the due process clause of the Fourteenth Amendment. The bill was dismissed by the District Court, upon defendants' motion, without opinion. This direct appeal was allowed, March 31, 1924, under § 238 of the Judicial Code.

The case made by the bill and exhibits is this: The plaintiffs are non-residents of West Virginia. Four of them claim to be the owners of certain undivided interests in lands in Nicholas County, West Virginia, conveyed to them by deeds from their co-plaintiff W. B. Stephenson, executed in good faith and for valuable considerations. The defendant Cawley, a creditor of W. B. Stephenson holding unsatisfied judgments against him, brought a suit in equity against the plaintiffs in the Circuit Court of the county to set aside the deeds as fraudulent and sell the lands to satisfy the judgments. The plaintiffs were proceeded against as non-residents, by an order of publication, without personal service of process. An order of attachment was also issued and levied upon the lands. The plaintiffs not having appeared within the time required by the order of publication, a decree *nisi* was entered and set for hearing; and thereafter a decree was entered adjudging that the deeds from W. B. Stephenson were made to defraud

his creditors, setting the same aside as to the debt to Cawley, and directing a sale of the lands in satisfaction of the judgments. They were purchased by the defendants Kirtley and Herold at the commissioners' sale. This sale was confirmed by a subsequent decree; and a deed was executed by the commissioners to the purchasers, who entered into possession of the lands. The plaintiffs, who under the laws of West Virginia were allowed to appear and make defense to the suit within two years from the date of the final decree, had no knowledge of these proceedings until after this time had expired.

The bill alleged that these proceedings were null and void: 1st, because the Circuit Court did not have jurisdiction to enter the decrees, since under the laws of West Virginia the order of attachment upon which its jurisdiction depended was void and conferred no jurisdiction for the reason that the affidavit upon which it was based lacked the required certainty and was invalid; and 2nd, because under the law of West Virginia there can be no valid decree in a suit in which no personal service has been had without proof of the facts upon which it rests, and the court was without jurisdiction to enter the decree setting aside the deeds and ordering the sale, for the reason that no proof was offered that the deeds were fraudulent.

The bill further alleged that the action of the Circuit Court in adjudging that the deeds were fraudulent, without personal service of process or hearing any evidence or having any trial upon the question, and decreeing the sale of the lands, was a denial of due process of law to the plaintiffs in violation of the Fourteenth Amendment; and it prayed that the decrees directing and confirming the sale of the lands and the commissioners' deed thereto, be decreed to be null and void; that the cloud arising therefrom upon their title be removed; and that they be adjudged to be the owners of the lands.

1. Assuming, without deciding, that notwithstanding the constructive service of process by the order of publication, the jurisdiction of the court over the lands depended upon the attachment, we find no invalidity in the affidavit on which the order of attachment issued. The statute merely requires the affidavit to state "the nature of the plaintiff's claim." Barnes' West Virginia Code, ch. 106, § 1, p. 1995. Here after stating generally the nature of the claim, it set forth with reasonable certainty and the par-

ticularity of fact necessary to show a cause of action, the unpaid judgments held by Cawley against W. B. Stephenson upon which the claim was based. This was sufficient. *Flannigan* v. *Tie Co.*, 77 W. Va. 158, 159. Furthermore, where a writ of attachment has been issued and levied, the preliminary affidavit has served its purpose, and even though it be defective and an appellate court might find in it sufficient error to reverse the judgment, this does not deprive the court of the jurisdiction acquired by the levy of the writ. *Cooper* v. *Reynolds*, 10 Wall. 308, 319; *Ludlow* v. *Ramsey*, 11 Wall. 581, 588; *Miller* v. *White*, 46 W. Va. 67, 71; *McIntosh* v. *Oil Co.*, 47 W. Va. 832, 837.

2. It is recited in the decree of sale that it appeared to the satisfaction of the court "from the papers and evidence" that the deeds from W. B. Stephenson were made to defraud his creditors. The present suit is a collateral proceeding to set aside the sale made by the Circuit Court, *Ludlow* v. *Ramsey*, *supra*, p. 587, a court of general jurisdiction; and the recitals in its decree, which import verity, cannot be drawn in question herein. *Ballard* v. *Hunter*, 204 U. S. 241, 265. Furthermore, as the court had acquired jurisdiction by the levy of the writ of attachment and a decree *nisi* had been entered upon the order of publication, a failure to hear proof before adjudging that the deeds were fraudulent and ordering the sale, would neither have deprived the court of its jurisdiction nor constituted a denial of due process. The allegations of the complaint might be established either by the introduction of proof or by admission through the default; and error or irregularity in this respect would neither constitute ground for setting aside the decree which the court had acquired jurisdiction to render, nor take from it the attribute of due process. *Ballard* v. *Hunter*, *supra*, pp. 250, 258.

3. This disposes of all the grounds upon which the validity of the proceedings was challenged by the bill. We therefore neither consider other matters urged in the appellants' brief relating to the alleged invalidity of the order of publication, nor the defense of good faith purchase relied upon in the brief of appellees. We find no want of jurisdiction in the Circuit Court by reason of the matters alleged in the bill, nor want of due process invalidating the proceedings under the Fourteenth Amendment.

The decree of the District Court is

*Affirmed.*